60139-3

60139-3

~~81759-6~~

81478-3

NO. 60139-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FERID MAŠIĆ,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

RESPONDENT'S BRIEF

ROBERT M. MCKENNA
Attorney General

MASAKO KANAZAWA
Assistant Attorney General
WSBA #32703
800 Fifth Avenue Suite 2000
Seattle, WA 98104-3188
(206) 389-2126

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

This is a workers' compensation case brought under Industrial Insurance Act, Title 51 RCW.[1] Ferid Mašić appeals from a superior court judgment that affirmed the order of the Board of Industrial Insurance Appeals that dismissed Mašić's appeal from an order of the Department of Labor and Industries as untimely filed under RCW 51.52.060.

Due process does not require government to provide notice of its decisions or services to limited English proficient (LEP) persons in their primary languages. The Department provides translation services to unrepresented LEP claimants upon their requests. But there is no evidence that Mašić, before hiring his attorney, made such a request. The Board, throughout its recorded proceedings, provided Mašić with a qualified interpreter, whose use he did not question at hearing, in his petition for review to the Board, or at the superior court.

The Board properly found Mašić's appeal untimely by rejecting as not credible his testimony about the date he received the Department

[1] Mašić raises issues relating to the existence and the scope of limited English proficient claimants' right to interpreter services. Similar issues are being raised in the following four cases pending at this Court involving Bosnian-speaking claimants represented by the same attorney who represents Mašić: *Mestrovac v. Dep't of Labor & Indus.*, No. 58200-3-I; *Kustura v. Dep't of Labor & Indus.*, No. 57445-1-I (three consolidated cases); *Ferenćak v. Dep't of Labor & Indus.*, No. 58878-8-I; *Resulović v. Dep't of Labor & Indus.*, No. 59614-4-I. This Court heard consolidated oral arguments in *Meštrovac*, *Kustura*, and *Ferenćak* on November 19, 2007.

order. Mašić fails to demonstrate any reversible error in the superior court judgment. The Court should affirm the judgment.

II. COUNTERSTATEMENT OF THE ISSUES

A. When a claimant receives a Department order, has it been "communicated" to him per RCW 51.52.060?

B. Does substantial evidence support the finding that Mašić failed to appeal the 9/28/04 order within 60 days of his receipt of the order?

C. Did Mašić waive his argument that the Department order failed to use "black faced type" or failed to notify him of his right to protest the order? In any event, does his argument have any merit?

D. Did the Department violate Mašić's statutory, Constitutional, or other rights in sending an English-written order or limiting interpreter services?

E. Did the Board properly appoint a qualified interpreter for Mašić at the hearing, and, in any event, did Mašić waive any objection to the use of the interpreter?

F. Did the Board properly find Mašić's appeal untimely, by rejecting his testimony as not credible, when he testified he received the appealed order on the day his mother died but later admitted she was still alive?

G. Did the Board violate Mašić's statutory, Constitutional, or other rights in not providing free interpreter services for his private conversations with his attorney?

H. Did the superior court properly award, as costs, $200 statutory attorney fees to the Department?

///

III. COUNTERSTATEMENT OF THE CASE

A. Department Claim Administration

On or about March 23, 2004, Mašić filed a workers' compensation claim, stating in English that he sustained an injury while working for Seattle Concrete Design. Mašić (10/25/05) 15, 38; 40;[2] Certified Appeals Board Record (BR) 74 Ex. 1, 9; Finding of Fact (FF)[3] 1. Mašić did not mark the language preference column on the application form. BR Ex. 9. Mašić admitted he signed the form and sent it to the Department. Mašić (10/25/05) 15, 40. He had two prior claims and had exchanged correspondence with the Department in English. Mašić (10/25/05) 41; Owen (11/9/05) 28; Mašić (11/9/05) 25, 214-16; BR Ex. 10, 11, 16.

On April 13, 2004, the Department issued an order written in English, denying Mašić's claim, stating that the Department was unable to substantiate an employer-employee relationship at the time of his alleged injury. BR Ex. 3; FF 1. In May 2004, Mašić filed a timely English-written protest and request for reconsideration, stating, among other

---

[2] This brief refers to the testimony/statements at the Board proceedings by "TR" or the surname of the witness or the maker of the statement, followed by the date of the proceeding and the page number of the transcript where the testimony/statements are found and refers to the exhibits admitted at the Board as "BR Ex." and the exhibit number. The transcripts and the exhibits are in the Certified Appeal Board Record.

[3] Findings of Fact refer to those made by the Board in its final order adopted by the superior court in its judgment. Copies of the superior court judgment (CP 1-3), the Board decision (BR 2, 62-72), and the Department order that Mašić appealed to the Board (BR 74) are attached as Appendices A, B, and C, respectively.

things, "I worked with 'SEATTLE CONCRETE DISING' (Owner Muhamed Hadzimuratovic . . .) in 2003."[4] BR Ex. 4; FF 1.

On September 28, 2004, the Department issued an order, affirming the April 13, 2004 order. BR 74 (App. C) (9/28/04 order). On October 28, 2004, Mašić filed a notice of representation, informing the Department that he had hired his current attorney on all of his industrial insurance matters.[5] BR Ex. 6 (App. F).

On December 6, 2004, Mašić filed a notice of appeal to the Board from the 9/28/04 order.[6] BR Ex. 7 (App. G); FF 3.

B. Board Proceedings

In his notice of appeal to the Board, Mašić stated that the date of his receipt of the 9/28/04 order was "Not Known." BR Ex. 7 (App. G) at 2. He stated that because he was LEP, he "did not understand that failure to appeal from [the order] within 60 days might operate as a waiver of any . . . appeal rights . . .." BR Ex. 7 (App. G) at 1.

The Board conducted a hearing to determine the timeliness of Mašić's appeal. Mašić admitted he received the 9/28/04 order but stated that it "came ten days later maybe. Maybe about ten days, maybe more." Mašić (10/25/05) 31-32. He testified that a man who lived in the same

[4] Copies of the 4/13/04 order (BR Ex. 3) and Mašić's protest and request for reconsideration (BR Ex. 4) are attached as Appendices D and E, respectively.

[5] A copy of the notice of representation (BR Ex. 6) is attached as Appendix F.

[6] Copies of Mašić's notice of appeal (BR Ex. 7) are attached as Appendix G.

apartment complex brought the order to him maybe on October 9 or 10, 2004 and told Mašić "he took all the mail out and by mistake opened everything and by mistake opened this one too." Mašić (10/25/05) 32.

Mašić later testified he always remembered the day he received the 9/28/04 order, because it was the day his mother died:

Mašić:	And I will always remember that day.
Q:	Why were you chagrined?
Mašić:	*My mother died.*
Q:	*Your mother died on October the 9th?*
Mašić:	*Yes*. They told me. They called me from Bosnia, and told me that *she died.*

Mašić (11/9/05) 224-25 (emphasis added).

Mašić testified that when he received the 9/28/04 order, he had it translated into English and made an appointment with his attorney:

Owen:	What did you do when you got Exhibit 5?
Mašić:	The translator. Somebody who speaks English translated this for me. I was surprised to see it.
Owen:	What did you do next after you had it translated for you?
Mašić:	A woman who speaks English, and she's an interpreter, I asked her to call a lawyer for me and to make an appointment.

Mašić (10/25/05) 34. Mašić testified he met with his current attorney to discuss the order on October 28, 2004. Mašić (11/9/05) 199-200. Mašić testified that a Bosnian interpreter was present at this meeting, so Mašić was able to communicate with his attorney. Mašić (11/9/05) 200-201.

Three other witnesses testified on Mašić's English proficiency.[7] After the hearing, the IAJ ruled that Mašić's appeal was timely by finding credible his testimony that he received the 9/28/04 order on the day his mother died. TR (11/18/05) 25-26. The industrial appeals judge (IAJ) of the Board issued an interlocutory order and scheduled a hearing on the merits of Mašić's appeal. BR 1397-1401.

Seattle Concrete Design filed a motion to show cause why the IAJ's interlocutory timeliness ruling should not be vacated, citing, among other things, CR 54(b) and CR 60, and submitted declarations that stated that Mašić's mother was still alive. BR 1403-88. The IAJ issued an order directing Mašić to show cause. BR 1542.

Mašić filed response pleadings with, among other things, his declaration. BR 1545-1601, 1747-1920. In his declaration, Mašić admitted his mother was alive but stated he did receive a phone call from his uncle in Bosnia on October 9 or 10, 2004 and, with a bad phone connection, believed his uncle said his mother had died.[8] Mašić stated that

---

[7] John Chadwick, the dean of basic studies at Renton Technical College, Marcia Arthur, an ESL instructor at the same college, and Gibb Kingsley of the Washington Department of Licensing testified. Chadwick testified, based on his review of the record at the college, that Mašić was placed in Level 5 of the college's ESL class, which indicated his ability to read well and "skills for studying, and figuring out – looking up words, and strategies for – for reading." Chadwick (11/9/05) 38, 46, 51. Arthur testified, based on her review of the record, that Mašić should be able to understand the 9/28/04 order by looking up certain words. Arthur (11/9/05) 91-92. Kingsley testified that Mašić obtained a commercial driver's license in June 2001. Kingsley (11/9/05) 137-38.

[8] In his declaration, Mašić stated, among other things at BR 1551:

he tried to explain at the hearing that he "remembered the date because [he] received the order the same weekend [he] had been called and told [his] mother died." BR 1551.

The Department filed a motion in limine and argued that the Board need not take further testimony and should simply reject Mašić's testimony about his receipt of the 9/28/04 order as not credible in light of his new admission that his mother was still alive. BR 1665-67.

The IAJ issued a proposed decision dismissing Mašić's appeal as untimely by rejecting, as not credible, Mašić's testimony about the date he received the 9/28/04 order. BR 62-72 (App. B). The IAJ also stated, "I truly believe that [Mašić's] level of understanding and communication in English is far greater than he leads on." BR 69 (App. B).

> On the weekend of October 9 and 10 of 2004, I received a telephone call from my uncle Smajo Mašić who lives in Bosnia in Ozimica, my home town. He called me, saying that my father had asked him to call and tell me about my mother. We had a bad telephone connection. Smajo either said my mother "umrla" or "umire." When I heard this, I heard "umrla" which means "died." I became very upset because I believed my mother had died. Because of this, I was very upset that weekend. It was not until my father called me the next day to tell me that my mother had survived the night that I knew that she was alive. My father told me that everyone thought my mother was dying that night but that despite the fact that she had become unconscious and nearly died during the night she had survived. Because of my uncle's call, I thought my mother had died. In both my family here and in my family in Bosnia, we refer to this as the time my mother "died."

The Board later denied Mašić's petition for review and adopted the IAJ's decision as its final order. BR 2 (App. B). Mašić appealed to King County Superior Court.

C. Superior Court Proceedings

After a bench trial, the superior court issued a judgment and affirmed the Board order. CP 1-3 (App. A). The superior court adopted all of the Board's findings and conclusions, except for one apparent error as to the date the Board received Mašić's appeal (December 7, 2004), which the court found to be immaterial as the Board found that Mašić filed his appeal on December 6, 2004. CP 2-3 (App. A). The superior court further concluded that neither the Department nor the Board violated any of Mašić's statutory, due process, or equal protection rights to interpreter services and that Mašić was not entitled to equitable relief from the statutory limitation under RCW 51.52.060. CP 3 (App. A) (Conclusion of Law 2.3). Mašić appealed the superior court judgment to this Court.

IV. STANDARD OF REVIEW

"RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act." *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 857, 86 P.3d 826 (2004).

The superior court reviews a Board decision de novo but "only in an appellate capacity" and "cannot consider matters outside the record or

presented for the first time on appeal." *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969); RCW 51.52.115. The "findings and decisions of the Board are prima facie correct and the burden of proof is on the party attacking them": here, Mašić. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); RCW 51.52.115.

This Court reviews "the findings made after the superior court's de novo review" to "see whether substantial evidence supports the findings" and "whether the court's conclusions of law flow from" them. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Evidence is substantial if "sufficient to persuade a fair-minded, rational person of the truth of the matter." *R & G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). This Court reviews issues of statutory and constitutional interpretation de novo. *See Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002).

V. ARGUMENT

A. Mašić's Receipt of the 9/28/04 Order Constituted "Communication" under RCW 51.52.060 and *Rodriguez*

Mašić argues that the 9/28/04 order never became final, claiming that it was not "communicated" to him under RCW 51.52.050 or 51.52.060 because it was not written in Bosnian. Appellant's Brief at 13-16. The Supreme Court has already rejected this argument.

Mašić had 60 days in which to appeal the 9/28/04 order to the Board after "the day on which a copy of the order . . . was communicated" to him. RCW 51.52.060. In a case involving an extremely illiterate Spanish-speaking claimant, the Supreme Court read the word "communicated" in RCW 51.52.060 to not denote "actual understanding on the part of the [claimant] of the nature of the order" and to require "only that a copy of the order be received by the [claimant]." *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 951-53, 540 P.2d 1359 (1975).

Mašić claims that the interpretation of "communicated" in *Rodriguez* is "dicta." Appellant's Brief at 15. He is incorrect. The *Rodriguez* Court held the appeal there "not timely" under RCW 51.52.060, *Rodriguez*, 85 Wn.2d at 953, but *equitably excused* the untimely filing, *id.* at 954. *Rodriguez* governs the meaning of "communicated" in 51.52.060. Once "a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976).

B. Substantial Evidence Supports the Finding that Mašić Failed to Appeal the 9/28/04 Order within 60 Days of His Receipt

Mašić claims he appealed the 9/28/04 order within 60 days of his receipt thereof, based solely on his own testimony (rejected by the Board

and the superior court) that he received the order on October 9, 2004. Appellant's Brief at 9. Substantial evidence demonstrates otherwise.

As Mašić conceded, the Department mailed the 9/28/04 order on the same day, and he appealed it on December 6, 2004. BR 1748, 1755. "Once a party proves the item was mailed, the law presumes that 'the mails proceed in due course and that the letter is received by the person to whom it is addressed.'" *Scheeler v. Employment Sec. Dep't*, 122 Wn. App. 484, 489, 93 P.3d 965 (2004) (citation omitted). Mašić conceded it took him more than 60 days of the "anticipated normal US Postal Service delivery" of the 9/28/04 order, "rebuttably assumed to be received 3 days later on October 1st". BR 1755. Mašić thus had until November 30, 2004 to timely file his appeal. BR Ex. 8; RCW 51.52.060. He failed to do so. He failed to rebut the presumption that he received the order by October 1, 2004. This Court may not re-weigh evidence. *See Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

C. Mašić Waived His Argument that the 9/28/04 Order Failed to Use "Black Faced Type" or Advise Him of His Right to Protest, and, In Any Event, His Argument Lacks Merit

Mašić complains that the 9/28/04 order did not use "black faced type" or advise him of his right to *protest* (as opposed to *appeal*) under RCW 51.52.050. Appellant's Brief at 10-13. A final Department order shall contain "a statement, set in black faced type of at least ten point body

or size, that such final order . . . shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the [Department], or an appeal is filed with the [Board]". RCW 51.52.050. "Black faced" means "bold faced," and the 9/28/04 order stated Mašić's appeal rights in black, capitalized letters, not bold type. BR 74 (App. C).

But Mašić never raised these arguments at the Board. BR 3-33 (petition for review). He has thus waived the arguments. *See* RCW 51.52.104 ("petition for review shall set forth in detail the grounds therefor and the party . . . filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein"); *Sepich*, 75 Wn.2d at 316 (superior court can "only pass upon those matters that have first been presented to the Board"); *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 711 n.5, 57 P.3d 248 (2002) (party waives a theory by failing to raise it at the Board); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) ("Allan waive this objection because it was not set out in her petition for review . . ..").

In any event, the statement of appeal rights "is not statutory notice of the action of the department to the person to whom it is mailed." *Porter v. Dep't of Labor & Indus.*, 44 Wn.2d 798, 800, 271 P.2d 429 (1954). "The copy of the order . . . is itself the notice of the action taken," and "the

statement required to be printed on the copy thereof is merely a warning of the statutory requirement that an appeal must be taken within sixty days, and does not affect the validity of the communication of the 'order' . . . to the person who receives it." *Porter*, 44 Wn.2d at 801-802; *see also In re Eugene Jackl*, BIIA Dec., 88 2528, 1988 WL 236608, *2 (1988) (significant decision)[9] ("No evidence was presented that the claimant was in any way prejudiced by the Department's failure to print the 'notice of appeal rights' in ten point, 100% black faced type."); *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005) (The Board "significant decisions" are "persuasive authority").

Mašić fails to show actual prejudice by the Department's failure to use black typed face or notify him of his right to file a protest, when he had the 9/28/04 order translated into Bosnian and retained his attorney on October 28, 2004 to handle it, and his attorney appealed (not protested) the order belatedly. Mašić (10/25/05) 34; Mašić (11/9/05) 199-200.

[9] The Board designates and publishes certain decisions as "significant decisions." RCW 51.52.160.

D. The Superior Court Properly Denied Mašić Equitable Relief[10]

Mašić argues that he is entitled to an equitable relief from the 60-day statutory limitation under RCW 51.52.060. Appellant's Brief at 25-29. This Court reviews the trial court's decision to exercise equitable power for an abuse of discretion. *Rabey v. Dep't of Labor & Indus.*, 101 Wn. App. 390, 397, 3 P.3d 217 (2000). The superior court properly determined that Mašić was not entitled to an equitable relief. CP 3.

Although Washington courts have equitable power to set aside a Department action, they have rarely exercised that power. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 173, 937 P.2d 565 (1997) (plurality); *Rabey*, 101 Wn. App. at 395 ("This equitable exception has been used sparingly when workers have missed the 60-day limit for filing appeals."). An "equitable remedy is an extraordinary, not ordinary form of relief." *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (citation omitted).

---

[10] Mašić complains that in an unrelated case involving a different claimant, a different Assistant Attorney General agreed in the Board proceeding that the 60-day appeal period did not begin until an interpreter translated the order to the claimant. Appellant's Brief at 26 n.11. But Mašić does not provide any argument that such an agreement in an unrelated case with distinct factual circumstances would have any relevance here. The parties' agreement on jurisdiction in that case would not be binding on the Board or courts even in that case, much less in this unrelated case. *See State v. Knighten*, 109 Wn.2d 896, 901-902, 748 P.2d 1118 (1988) (a court is not bound by a party's erroneous concession or stipulation on a question of law); *Barnett v. Hicks*, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992) ("Litigants cannot stipulate to jurisdiction nor can they create their own boundaries of review").

Our Supreme Court has found extraordinary circumstances justifying equitable relief from the appeal deadline under RCW 51.52.060 in two cases: *Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 30 P.2d 239 (1934) (relief granted to an incompetent committed to a hospital during the appeal period), and *Rodriguez*, *supra* (relief granted to an extreme illiterate whose interpreter was hospitalized and unavailable and his mother about to undergo surgery in Texas during the appeal period).[11] The courts have denied equitable relief when the claimant failed to show diligence,[12] his or her inability to understand the order, or the Department's misconduct.[13]

In the due process context, the courts have required diligence and further inquiry to a LEP person and held that English notice to the person

---

[11] In a different context, this Court in *Rabey* upheld the trial court's *grant* of equitable relief from the 1-year statutory limitation for filing a survivor's claim as based on "reasonable and tenable grounds," *Rabey*, 101 Wn. App. at 399, when the worker's widow (1) was "shocked and disoriented" by her husband's death, in "a form of diminished capacity similar to that found in *Ames*," *id.* at 397; (2) reasonably relied on the employer's lead human resource manager, who led her to believe she had no claim; and (3) "ha[d] not exhibited a lack of diligence in perfecting her claim," *id.* at 398.

[12] *See Kingery*, 132 Wn.2d at 178 (majority); *Kingery*, 132 Wn.2d at 178 (Madsen, J., concurring) ("I agree with the majority . . . that the claimant in this case failed to diligently pursue her rights."); *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) ("Equity aids the vigilant, not those who slumber on their rights."); *Dep't of Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002) ("[A]s one condition of equitable relief, the claimant must have diligently pursued his or her rights."); *Harman v. Dep't of Labor & Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002) ("Ignorance of the law has never been an adequate defense.").

[13] *See Kingery*, 132 Wn.2d at 174 (plurality) (under *Ames* and *Rodriguez*, two elements must be met for equitable relief from the timeliness requirements of RCW 51.52.060 – (1) the claimant's inability to understand the order and the appellate process and (2) the Department's misconduct in communicating the order); *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 839, 125 P.3d 202 (2005) (same).

is sufficient so long as it "would put a reasonable recipient on notice that further inquiry is required." *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999); *Guerrero v. Carleson*, 512 P.2d 833, 836 (Cal. 1973) (government "may reasonably assume" that LEP person "will act promptly to obtain [language] assistance when he receives the notice in question"), *cert. denied*, 414 U.S. 1137, 94 S. Ct. 883, 38 L. Ed. 2d 762 (1974); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983) (requiring "diligence and further inquiry" to a LEP person "served in this country with a notice in English does not violate any principle of due process"), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909 (Mass. 1975) (same).

Similarly, in the context of statutory limitations for filing a habeas corpus petition, courts "have rejected a per se rule that a petitioner's language limitations can justify equitable tolling, but have recognized that equitable tolling may be justified if language barriers actually prevent timely filing." *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006) ("non-English speaker who could not find a willing translator could qualify for equitable tolling"); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) ("the existence of a translator" to assist a person during his appellate proceedings implies that the person lacks reasonable cause for "remaining ignorant of the legal requirement for filing his claim").

The requirement of diligence and further inquiry for LEP persons in due process and other legal contexts is consistent with the principles developed in *Ames*, *Rodriguez*, and *Kingery* that require diligence on the claimant seeking equitable relief from the 60-day appeal deadline.

The 9/28/04 order contained Mašić's name, claim number, injury date, the Department's name and address, and the claim manager's phone number. BR 74 (App. C). The order would thus alert a reasonable LEP claimant to seek assistance, if necessary, as Mašić did. Mašić testified he learned the content of the order through an interpreter and met with his attorney to discuss it with an interpreter in October 2004. Mašić (10/25/05) 34; Mašić (11/9/05) 199-201. On October 28, 2004, his attorney notified the Department that Mašić had retained her for all of his industrial insurance matters. BR Ex. 6 (App. F). Mašić had more than a month after that to timely file his appeal. BR Ex. 8. Mašić fails to explain why he waited until December 6, 2004 to file his appeal or how his language barrier, if any, in fact caused this delay. There is no basis to excuse his late appeal.[14]

---

[14] Mašić asserts he "has PTSD, industrially related, compounding the language barrier." Appellant's Brief at 28 (referring to BR 2052-61). But his assertion is not supported by any evidence presented at the Board. The documents at BR 2052-2061 are those he attached to his pleading submitted to the Board, not evidence in the record. Mašić further asserts that his putative employer acted with unclean hands. Appellant's Brief at 29. He claims his putative employer offered him a "$1000 bribe not to pursue his claim". Appellant's Brief at 5 (referring to BR 1973). But his assertion is not based on

Further, Mašić fails to show any misconduct by the Department. *Kingery*, 132 Wn.2d at 174 (plurality) (Department misconduct is an element for equitable relief); *Lynn*, 130 Wn. App. at 839 (same). He claims the Department knew he was LEP when it sent the 9/28/04 order. Appellant's Brief at 1, 29. But Mašić points only to Exhibit 2 admitted at the Board, asserting that he informed the Department he lacked English fluency. Appellant's Brief at 5. But, as Mašić admitted, Exhibit 2 is not an exact copy of any letter he sent to the Department and does not contain any date. TR (10/25/05) 28. In fact, before the Department issued the 9/28/04 order, Mašić had exchanged English-written correspondence with the Department, including his May 2004 protest to a prior English-written order (which the 9/28/04 order affirmed), in which Mašić responded in English to the Department's stated basis for rejecting his claim without any translation request. BR Ex. 4 (App. E), 11; Mašić (10/25/05) 29-30.

Mašić's reliance on *Somsak v. Criton Technologies*, 113 Wn. App. 84, 52 P.3d 43 (2002), is misplaced. *Somsak* does not involve an English order sent to a LEP claimant – it addressed the res judicata effect of a Department order that did not clearly encompass an issue, the litigation of which the employer sought to preclude. *Somsak* is inapposite here.

---

any evidence presented at the Board. The cited record shows his own assertion in his declaration in his pleading submitted to the Board, not evidence.

Mašić's reliance on a Board decision, *In re Cecelia Envila*, Dckt. No. 93 1856, 1994 WL 739079 (Nov. 14, 1994),[15] is also misplaced. The Board there concluded that the illiterate, LEP claimant had no duty to immediately seek translations of documents. *Envila*, 1994 WL 739079, at *2. *Envila* is thus inconsistent with the duty of diligence required by the Supreme Court for equitable relief in *Kingery* and with due process and equitable tolling decisions requiring diligence and inquiry. *See Kingery*, 132 Wn.2d at 178; *Nazarova*, 171 F.3d at 483; *Guerrero*, 512 P.2d at 836; *Soberal-Perez*, 717 F.2d at 43; *Olivo*, 337 N.E.2d at 909; *Mendoza*, 449 F.3d at 1069; *Cobas*, 306 F.3d at 444. The Court must follow *Kingery*, not the Board's incorrect decision in *Envila*.

E. Mašić Fails to Show a Violation of Chapter 2.43 RCW

Mašić argues that the Department and the Board violated Washington's interpreter statute, Chapter 2.43 RCW, in not providing free interpreter services he claimed. Appellant's Brief at 39-41. But the statute does not apply to the Department claim administration and does not provide *free* interpreter services Mašić claimed at the Board.[16]

---

[15] Mašić incorrectly describes *Envila* as a significant decision of the Board.

[16] Mašić also argues that the policy stated in RCW 2.43.010 requires the Department to provide him with a Bosnian-written notice of its decision, Appellant's Brief at 16-17, and the Department and the Board to provide him with all the interpreter services he claimed, Appellant's Brief at 38. But the policy is "to *secure the rights*, constitutional or otherwise" of LEP persons. RCW 2.43.010 (emphasis added). Mašić's argument lacks merit, because, as this brief demonstrates, he fails to show any violation by the Department or the Board of any of his rights, "constitutional or otherwise."

Chapter 2.43 RCW does not apply to the Department claim administration, because it is not a "legal proceeding," which is defined as "a [1] proceeding in any court in this state, [2] grand jury hearing, or [3] hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof." RCW 2.43.020(3) (bracketed numbers added).[17] The claim administration is not a "hearing." A hearing begins after the Department makes an *ex parte* decision and only if an aggrieved party appeals it to the Board, which then conducts a de novo hearing to determine whether the decision is correct. RCW 51.52.050–.104.

In claiming that Chapter 2.43 RCW applies to the Department claim administration, Mašić does not present any legal analysis other than to say, "There is simply no other legislative authorization found in Washington statute for purchasing interpreter services to provide to LEP workers." Appellant's Brief at 40. But he overlooks the implied power

[17] The word "proceeding" is qualified only by the phrase "in any court in this state," which is separated by a comma from "grand jury hearing," and by another comma from "hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state . . .." RCW 2.43.030(3). "A comma serves many functions, but its purpose always is to set a phrase apart from the rest of the sentence." *E. Gig Harbor Improvement Ass'n v. Pierce County*, 106 Wn.2d 707, 713, 724 P.2d 1009 (1986). The qualifying prepositional phrases that follow "hearing" in the statute's description of the third category of legal proceeding modify only the word "hearing" that immediately precedes those qualifying prepositional phrases. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005) ("[U]nless a contrary intention appears in the statute, qualifying words and phrase refer to the last antecedent."). The phrase "or before an" that immediately precedes "administrative board" serves to avoid the implication that "of the state or any political subdivision thereof" modifies the phrase "inquiry judge."

the Legislature has vested in the Department to carry out its programs. *See generally Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-125, 864 P.2d 1382 (1994) (implied authority explained); *see also* RCW 43.22.030; RCW 51.04.010; -.030(1); RCW 51.32.095(1) -.114; RCW 51.36.010(1).

The Board proceeding is a "legal proceeding" but the Board was not required to provide free interpreter services, because it did not "initiate" the proceeding, and Mašić never claimed indigency. RCW 2.43.040(2), (3). The statute allocates interpreter costs to "the governmental body initiating the legal proceeding," RCW 2.43.040(2), and otherwise to "the non-English-speaking person, unless such person is indigent," RCW 2.43.040(3).[18] This distinction is consistent with the due process law that distinguishes "government-initiated proceedings seeking to affect adversely a person's status" such as "criminal prosecution, deportation or exclusion" and from "hearings arising from the person's affirmative application for a benefit". *Abdullah v. INS*, 184 F.3d 158, 165 (2nd Cir. 1999) (due process does not require an interpreter for special agricultural worker status applicant during INS interview); *see also State v. Nemitz*, 105 Wn. App. 205, 211, 19 P.3d 480 (2001) ("The purpose of

[18] Mašic refers to Washington State LEP Plan (Appellant's Brief at 34), but the LEP Plan interprets RCW 2.43.040 to allocate interpreter costs to government only when it initiates a legal proceeding in which a LEP individual is compelled to appear.

the interpreter statute is to provide interpreters for defendants, witnesses, and others compelled to appear.").

Here, Mašić initiated the Board proceeding by filing an appeal. RCW 51.52.050, .060. RCW 2.43.040(3) thus allocated interpreter costs to him. Mašić cites *State v. Marintorres*, 93 Wn. App. 442, 969 P.2d 501 (1999), to hold any difference between the provision of services for the hearing-impaired in Chapter 2.42 RCW and that for the LEP in Chapter 2.43 RCW violates equal protection. Appellant's Brief at 34-35. But *Marintorres* is a criminal case, involving a Sixth Amendment right to an interpreter. *See State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). The *Marintorres* Court held that a convicted defendant may not be assessed interpreter costs under RCW 2.43.040(4) (interpreter cost is a "taxable cost") and RCW 10.01.160 (court may require a convicted defendant to pay costs). *Marintorres*, 93 Wn. App. at 450.

Marintorres should be read as limited to its special criminal context, especially when the court did not engage in a thorough equal protection analysis or address the principle that equal protection "does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486-487, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Also, there is a conceivable rational basis for differently addressing interpreter services

for the hearing-impaired and the LEP – sign language may cover most hearing-impaired, while there are thousands of languages[19] to cover all LEP persons. *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000) (rational basis test upholds a classification if reasonably justified by "any conceivable state of facts").[20]

Although not required, the Board, per its rule adopted under RCW 51.52.020 (not under Chapter 2.43 RCW as Mašić argues, Appellant's Brief at 40), provided Mašić with an interpreter, at its expense, throughout its proceedings. *See* WAC 263-12-097 (the Board *may* appoint and pay for an interpreter). Mašić's challenge to WAC 263-12-097 (Appellant's Brief at 37) is not based on any authority and should be rejected.

Mašić's private conversations with his attorney at his attorney's office or during a hearing recess are not part of the Board's "legal proceeding," because such conversations are off-the-record and thus not "before" the Board. RCW 2.43.020(3). Also, there is "no constitutional

---

[19] There are 6900 plus living languages in the world. Raymond G. Gordon, Jr., *Ethnologue: Languages of the World* (15th ed. 2005), available at http:www.ethnologue.com; *see also World Almanac & Book of Facts* 731-32 (2006).

[20] Reading *Marintorres* as limited to its criminal context is proper also because three subsections of RCW 2.42.120 have been declared invalid under Washington Constitution article II, section 19 by the Supreme Court in *Patrice v. Murphy*, 136 Wn.2d 845, 853-55, 966 P.2d 1271 (1988) (RCW 2.42.120(4), (5)) and by this Court in *State v. Harris*, 97 Wn. App. 647, 655-56, 985 P.2d 417 (1999) (RCW 2.42.120(3)), and there remains an issue on the validity of RCW 2.42.120(1) under article II, section 19.

right to counsel afforded indigents involved in worker compensation appeals." *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995).[21]

Mašić claims he has a right "to confer with counsel to prepare for and during hearings," citing to RCW 51.04.080, WAC 263-12-020, and RCW 34.05.428.[22] Appellant's Brief at 43-44. But the statutes and rule do not provide for free interpreter services for his private conversations with his attorney.[23] Mašić asserts that a General Rule 11.3(d) provision about telephonic interpretation "applies at the Board via WAC 263-12-125." Appellant's Brief at 44. But WAC 263-12-125 incorporates procedural statutes and rules applicable in superior court civil cases only if "applicable, and not in conflict with these rules," and WAC 263-12-097 provides that the "provisions of General Rule 11.3 regarding telephonic interpretation shall not apply to the board's use of interpreters."

///

---

[21] Mašić's reliance on *State v. Gonzales-Morales*, *supra*, Appellant's Brief at 44 n.23, is misplaced. As stated above, *Gonzales-Morales* holds that a criminal defendant has a Sixth Amendment right to an interpreter, which is not applicable here.

[22] Mašić cites to RCW 34.05.*048*(2), but it must be a typo. There is no such provision, and he appears to quote the language in RCW 34.05.*428*(2).

[23] RCW 51.04.080 provides that notices, orders, and warrants for a claimant may be forwarded to his or her representative. WAC 263-12-020(1)(a) allows a party to appear "by an attorney at law". RCW 34.05.428 does not apply to the Department or Board. RCW 34.05.030(2)(a), (c). The statute provides only that a party may be advised and represented by counsel "at the party's own expense". Mašić also refers to the Department's "Worker's Guide to Industrial Insurance Benefits." Appellant's Brief at 43-44. But he does not explain how this material provides or recognizes right to counsel.

F. The Board Properly Appointed a Qualified Interpreter, and Mašić Waived Objection to the Use of the Interpreter

Mašić argues that the Board failed to use a qualified interpreter in violation of RCW 2.43.030(1)(c) and (2). Appellant's Brief at 29-31. He claims he objected to the use of Brankovan, the interpreter, pointing out his pre-hearing motion not to use her for the timeliness hearing. Appellant's Brief at 30 (referring to BR 882-99).[24] But Mašić never raised this argument or complained about the qualifications of Brankovan at the Board in his petition for review. BR 3-33. Nor did he do so at the superior court. CP 17-304 (all of the briefs Mašić filed with the superior court on the merits). He has thus waived the argument. *See* RAP 2.5(a); RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Stelter*, 147 Wn.2d at 711 n.5; *Allan*, 66 Wn. App. at 422.

In any event, Mašić did not question the qualifications of Brankovan at the hearing. At the beginning of the hearing, the IAJ swore in Brankovan and asked Brankovan of her education and experience

---

[24] Before the timeliness hearing, the Department conducted a discovery deposition of Mašić and obtained, at its expense, the services of Brankovan *per Mašić's request* that Brankovan be used. BR 547; TR (8/24/05) 20. In her letter to the IAJ dated July 25, 2005, Mašić's attorney stated Mašić had "agreed to stipulate to the interpretive capabilities of . . . Vera Brankovan . . . for the deposition," as she had interpreted at the Board hearings "successfully in the past". BR 565-566. After the deposition, Mašić moved the Board (1) to not use Brankovan for the timeliness hearing and (2) to direct the Department to pay for his asserted expenses in hiring another interpreter, Tumbic, to review the deposition transcript for accuracy. BR 882-900. The IAJ denied Mašić's request for reimbursement for his expenses for Tumbic's services but did not rule on Mašić's motion not to use Brankovan for the hearing at that time. TR (8/24/05) 21.

relating to her interpretive qualifications. TR (10/25/05) 3-6. The IAJ then asked Mašić's attorney whether she had any objection to the use of Brankovan, to which his attorney vaguely responded as follows:

IAJ:	Any objection to Ms. Brankovan being our interpreter today, Ms. Owen?
Owen:	I believe that we've addressed everything in writing to the Court on this matter.
IAJ:	Well, I'm asking you today how you feel today. *Any objection today*?
Owen:	*Nothing further today*, Your Honor.

TR (10/25/05) 6-7 (emphasis added). The above excerpt indicates Mašić's implicit approval of the use of Brankovan. In fact, in her letter to the IAJ submitted after the hearing, Mašić's attorney stated that Mašić "is no longer willing to stipulate to the use of [Brankovan] as interpreter." BR 1615. His attorney thus indicated Mašić's such stipulation until then.[26]

Further, Mašić fails to show that Brankovan was not qualified.[27] A qualified interpreter means "a person who is able readily to interpret or

---

[26] During the hearing, Mašić's attorney also implicitly acknowledged his stipulation to the use of Brankovan. Mašić's attorney pointed out Brankovan said "Benefitsia" in translating the word "claim." Owen (11/9/05) 20. Brankovan stated there is no exact word for "claim" in Bosnian, and using the word "benefits" is the only way to translate "claim." Brankovan (11/9/05) 20. The IAJ stated he believed Brankovan was making her best efforts, and, there being "*no objection to her being used as our interpreter for today's, or for the hearing on October 25*," Mašić's attorney, with limited Bosnian knowledge, may not question her at that point. IAJ (11/9/05) 21-22 (emphasis added). Mašić's attorney did not say Mašić objected to the use of Brankovan then. *See Bd. of Regents of Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 554, 741 P.2d 11 (1987) ("Where a party knows what is occurring and would be expected to speak, if he wished to protect his interests, his acquiescence manifests his tacit consent.").

[27] Mašić does not argue that the Board should have appointed a "certified" interpreter. Bosnian is not a language for which certified interpreters are available.

translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English." RCW 2.43.020(2). "The appointment of an interpreter is within the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse." *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 244, 165 P.3d 391 (2007).

Brankovan testified she was a native speaker of Serbo-Croatian-Bosnian and had a MBA from the City University in Seattle and a PhD from the UW Medical School. Brankovan (10/25/05) 4-6. She testified she was a state-authorized Serbo-Croatian-Bosnian interpreter for medical and social/legal contexts and had provided interpreter services in courts or other tribunals "hundreds" of times in 10 years. Brankovan (10/25/05) 6. The record does not indicate Brankovan was not qualified – the record indicates adequate translation and that Mašić was able to participate throughout the proceedings. The IAJ properly rejected Mašić's claim to the contrary.[28] Mašić fails to show an abuse of discretion.[29]

Brankovan (10/25/05) 6; *see also* information available at http://www.courts.wa.gov/programs_orgs/pos_interpret/.

[28] Although Mašić asserts that Brankovan showed her inability to effectively communicate with him during the discovery deposition, Appellant's Brief at 31, his assertion is not supported by the record and was properly rejected by the IAJ.

[29] Mašić argues that his appeal was determined based on a single word he used ("was dying" or "died") and thereby suggests he actually testified his mother "was dying" but was misinterpreted as saying his mother "died." Appellant's Brief at 29. But his argument is inconsistent with his prior position that his testimony that his mother "died" required context. Mašić stated in his declaration that he "could have said either [died] or

G. The Board Properly Found Mašić's Appeal Untimely by Rejecting His Testimony in Light of His Later Admission

Mašić claims that the Board found his appeal untimely based on inadmissible "collateral impeachment" – "whether [his] mother died in October 2004." Appellant's Brief at 31-33. But the Board properly made the challenged finding by rejecting as not credible Mašić's testimony that he received the 9/28/04 order on October 9, 2004, as the day his mother died, in light of his later admission that his mother was still alive.

The fact Mašić's mother was still alive was not collateral to the timeliness of his appeal, because the issue turned on the credibility of his testimony that he recalled the date he received the 9/28/04 order as the day his mother died.[30] *See State v. Johnson*, 192 Wash. 467, 73 P.2d 1342 (1937) (whether a matter is collateral depends on whether it is relevant to a material issue). In finding Mašić's appeal timely, the IAJ expressly relied on the same testimony. As the IAJ stated:

[dying]," BR 1550, and that he tried to explain at the hearing that he "remembered the date [he received the 9/28/04 order] because [he] received the order the same weekend [he] had been called and told [his] mother died," BR 1551. In any event, as the IAJ determined, the "*context* of his testifying that she 'died' makes it appear that his choice of words would make it more reasonable that he said 'died' and not 'dying.'" BR 70 (emphasis added). Further, the IAJ asked Mašić at the beginning of the hearing to indicate whenever he felt he was not effectively communicating with the interpreter, and Mašić agreed to do so, TR (10/25/05) 8, but did not indicate any problem during the time he gave the testimony that his mother died on October 9, 2004, Mašić (11/9/05) 224-25.

[30] In fact, at the end of the timeliness hearing, Mašić argued that the "only issue" raised was the credibility of his testimony that he received the 9/28/04 order on October 9, 2004, Owen (11/18/05) 4, and that Mašić had proved the timeliness of his appeal, asserting that he "did not demonstrate him to be sort of man who would lie about the death of his mother, Owen (11/18/05) 6-7.

> If Mr. Mašić had not testified about how he remembered the date he received the 9/28/04 order that is on a Saturday, which October 9, 2004 is, and that it corresponded to learning of his mother's death.
>
> ***
>
> If he had not testified to that I – I may not [have] believed him to the extent I did. But I think also based on his appearance when he testified to that fact, I did not believe he was making anything up about those circumstances.

IAJ (11/18/05) 25-26 (oral ruling). The IAJ confirmed this basis of his initial interlocutory ruling in his ultimate decision:

> Despite the existence of many irregularities and inconsistencies between the claimant's testimony and that provided by other witnesses, *I gave the benefit of the doubt to Mr. Mašić about his mother's condition.* I also stated during my oral ruling that I could vividly recall the claimant's demeanor and presence change when he mentioned that his mother died. I felt that his body language and his tone of voice (in Bosnian) were consistent with someone recalling the date one learns his mother dies.

BR 68 (proposed decision and order) (App. B) (emphasis added).

The IAJ reversed his interlocutory ruling based on the new information acknowledged by Mašić that his mother was still alive:

> The evidence presented by the employer raises no doubt that Mr. Mašić's mother was alive and living in Bosnia on or about November 9, 2004. (Even in the claimant's responses, there is no denial of the mother being alive). Clearly, with this new information, the basis for my initial ruling on jurisdiction was made relying on false testimony. After considering the new evidence about the status of claimant's mother, in determining whether the claimant filed a timely appeal of the September 28, 2004 Department order, as before, much of my determination rests on the claimant's overall credibility.

***

> Given the *new information about the claimant's mother*, the surrounding circumstances of when he claims he received the September 28, 2004 order cause me to be much more suspicious.
>
> ***
>
> Claimant argues that the misinformation about the status of the mother of Mr. Mašić is easily explained by considering inaccurate translation when Mr. Mašić testified in Bosnian and an interpreter (of a different cultural background than the claimant) translated into English. Such an argument, taken on its own, has merit. But *taken in consideration of the other testimony and my observations during the time Mr. Mašić testified about his mother having "died," leads me to conclude that the misinformation was not the fault of the interpreter.*

BR 68-70 (proposed decision and order) (App. B) (emphasis added).

Although Mašić argues that there was no basis under CR 60[31] for the IAJ to reverse its interlocutory ruling that his appeal was timely, Appellant's Brief at 32-33, the IAJ may reverse or modify its interlocutory ruling at any time before issuing a proposed decision under RCW 51.52.104. "In managing the litigation, the trial court must have wide discretion and authority, including the power to issue interlocutory orders, upon every aspect of the case." *Snyder v. State*, 19 Wn. App. 631, 636, 577 P.2d 160 (1978); *see also* CR 54(b) (any order or decision before the entry of a final judgment is subject to revision). An interlocutory ruling

[31] In its post-timeliness-hearing motion, Seattle Concrete Design requested relief under CR 54(b) as well as CR 60. BR 1411.

"may be changed, modified, reversed, or eliminated" and is "subject to revision at any time before final judgment." *Snyder*, 19 Wn. App. at 636.

H. The Industrial Insurance Act Does Not Provide for Free Interpreter Services Mašić Claimed

Mašić argues that he was entitled to free interpreter services at the Department and the Board as "benefits" under the Industrial Insurance Act (IIA). Appellant's Brief at 37. He provides no authority for his argument.

Mašić points out Department provider bulletins PB 03-01, PB 05-04, and 2007 Management Update as both inadequate and not followed by the Department here. Appellant's Brief at 35-37. He claims he received no language assistance for medical and vocational services in violation of PB 03-01 and PB 05-01. But the Department provides medical and vocational services to a covered "worker" under the IIA, RCW 51.32.010. Because the Department rejected Mašić's claim as not covered by the Act, such services were not provided. Also, the Management Update provides translation services upon a worker's request, if the worker is not represented by an attorney, and after verification of the need for such services.[32] Here, there is no proof Mašić requested translation of any of the Department documents before he hired his attorney. Further, the provider bulletins and the Management Update are "advisory only" and do

[32] A copy of the 2007 Management Update is attached as Appendix H.

"not implement or enforce the law".[33] *Wash. Educ. Ass'n v. Pub. Disclosure Comm'n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003).

I. Mašić's Claims of Violation under Chapter 49.60 RCW, Title VI, and Presidential Executive Order Lack Merit

Mašić claims that the Department and Board discriminated against him based on his national origin and violated Chapter 49.60 RCW, Washington's Law Against Discrimination (WLAD), Title VI of the federal Civil Rights Act, Executive Order (EO) 13166, and federal Department of Labor (DOL) Guidance. Appellant's Brief at 17-19, 38-39, 41. His arguments lack merit.

EO 13166 (2000 WL 34508183) (directing federal grant agencies to develop LEP guidelines) expressly and unambiguously states it does *not* create any enforceable "right or benefit, substantive or procedural":

> This order is intended only to improve the internal management of the executive branch and *does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.*

---

[33] Mašić also argues that the Department's not providing interpreter services in rejecting his claim or the Board's not providing interpreter services beyond the recorded proceedings violated the "aim" under the IIA to provide "sure and certain relief" to covered workers. Appellant's Brief at 38. But the statute does not provide for free interpreter services, and, in any event, Mašić fails to explain how the Department violated the statute in not providing interpreter services to him. Nor does he explain how the Board violated this statute. He only asserts that interpreter expenses are costly to injured workers. The Court should disregard Mašić's inadequately developed argument. *See State v. Thomas*, 150 Wn.2d 821, 868-869, 83 P.3d 970 (2004) ("[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.").

EO 13166 § 5 (emphasis added). This language demonstrates Presidential intent specifically to reject the type of argument raised by Mašić here.

The DOL Guidance was issued pursuant to EO 13166 and thus does not create any enforceable right. In any event, the Guidance is flexible, and "strong evidence of compliance" is shown if the Department "provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered." 68 Fed. Reg. 32290. Mašić shows no evidence that the group of Bosnian-speaking claimants constitutes 5% or 1,000 of those eligible for workers' compensation in Washington. Further, the "failure to provide written translations [specified in the Guideline] does not mean there is non-compliance." 68 Fed. Reg. 32290. If translation would be "so burdensome as to defeat the legitimate objectives of its programs, the translation of the written materials is not necessary." 68 Fed. Reg. 32290.

As to WLAD and Title VI, Mašić does not explain how a worker may raise such a discrimination claim in his appeal under the IIA. *See* RCW 49.60.030(2) ("Any person deeming himself . . . injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction."); *Sepich*, 75 Wn.2d at 316 (superior court "has no original jurisdiction" in workers' compensation cases); *Brand v. Dep't of Labor &*

Indus., 139 Wn.2d 659, 668, 989 P.2d 1111 (1999) (Title 51 RCW "provides exclusive procedures and remedies for injured workers").

Nor does Mašić provide adequate analysis under WLAD or Title VI to demonstrate an actionable discrimination. *See Alexander v. Sandoval*, 532 U.S. 275, 280-293, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (Section 602 of Title VI creates a privately enforceable right against "intentional discrimination," but not "disparate impact"). This Court should thus reject his arguments as not supported by any authority or analysis. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("[T]he three grounds argued are not supported by any reference to the record nor by any citation of authority; we do not consider them."); *State v. Thomas*, 150 Wn.2d 821, 868-869, 83 P.3d 970 (2004) ("[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.").

J. Mašić Fails to Show a Due Process Violation[34]

Mašić argues that the Department and the Board violated his procedural due process rights. Appellant's Brief at 19-21, 41-42. "Due process requires notice and an opportunity to be heard." *State v. Storhoff*,

[34] The Department will not engage in separate analysis of Washington and federal due process clauses, because Mašić does not make such analysis or suggest that a greater protection is provided under Washington's with an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

133 Wn.2d 523, 527, 946 P.2d 783 (1997). The Department's order at issue and the Board's evidentiary hearing satisfied due process.

1. The Department English notice satisfied due process

Mašić argues that the Department violated his due process rights by sending him an English-written order. Appellant's Brief at 19-21. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The Department 9/28/04 order satisfied due process.

The courts have determined that, in civil cases involving only economic interests as here, due process does not require government to provide notices or services to LEP persons in their primary languages. *See Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (notice of unemployment benefit denial); *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994) (administrative seizure); *Soberal-Perez*, 717 F.2d at 43 (social security); *Frontera v. Sindell*, 522 F.2d 1215, 1221 (6th Cir. 1975) (no due process right to civil service exam in Spanish); *Alfonso v. Bd. of Review*, 444 A.2d 1075, 1076-1078 (N.J. 1982) (unemployment benefit); *Olivo*, 337 N.E.2d at 909-910 (condemnation); *Hernandez v. Dep't of*

Labor, 416 N.E.2d 263, 266-267 (Ill. 1981) (unemployment benefit); *Guerrero*, 512 P.2d at 837 (welfare benefits).

As demonstrated above, *supra* Section V(D), due process requires diligence and further inquiry to LEP persons receiving English notice in this country, and the 9/28/04 order containing Mašić's name, claim number, injury date, the Department's name and address, and the claim manager's phone number, BR 74, satisfied due process notice mandate.

Mašić's reliance on *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), is misplaced. *Hull* did not involve a due process issue – it involved the constitutionality, under the First Amendment and the federal equal protection clause, of Arizona's constitutional amendment that "explicitly and broadly prohibit[ed] government employees from using non-English languages," thus prohibiting the "use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Hull*, 957 P.2d at 996. The *Hull* Court held that the amendment impermissibly restricted speech of public employees and others and was not narrowly tailored to meet its goal to promote English as a common language, because "English can be promoted without prohibiting the use of other languages by state and local governments." *Hull*, 957 P.2d at 1001. *Hull* pointed out, and turned in

significant part on, the "critical difference between encouraging the use of English and repressing the use of other languages." *Hull*, 957 P.2d at 991.

Unlike the constitutional amendment in *Hull*, the Department's English notices or services do not *prohibit* the use of any other languages. The *Hull* Court recognized that it is "not [the Court's] prerogative to impinge upon the Legislature's ability to require, under appropriate circumstances, the provision of services in languages other than English." *Hull*, 957 P.2d at 997. In other words, the decisions as to whether, when, and in what languages to provide language services should be "best left to those branches of government that can better assess the changing needs and demands of both the non-English speaking population and the government agencies that provide the translation." *Alfonso*, 444 A.2d at 1977; *see also Olivo*, 337 N.E.2d at 910 n.6; *Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 121 (S.D.N.Y. 1991).

Mašić's reliance on *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), is likewise misplaced. *Jones* involved a situation where a notice of a tax lien sale sent via a certified mail to a property owner was *returned unclaimed*, yet the government sold his property. *Jones*, 547 U.S. at 223-224. The *Jones* Court held "that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property

owner before selling his property, if it is practicable to do so." *Jones*, 547 U.S. at 225. The Court reasoned that if a letter is returned unclaimed, the sender "will ordinarily attempt to resend it," if practical, "especially . . . when . . . the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house." *Id.* at 230.

Unlike the situation in *Jones*, where a property owner did not receive the tax sale notice, Mašić admittedly received the 9/28/04 order, had it translated into Bosnian, and hired his attorney to handle it, more than a month before the 60-day appeal deadline.[35] Mašić (10/25/05) 34; Mašić (11/9/05) 199-200; BR Ex. 8. *Jones* is inapposite here.

2. Mašić received due process at the Board evidentiary hearing with an interpreter throughout the recorded proceedings

Mašić argues that the Board violated his due process right by not providing him with interpreter services for his private conversations with his attorney.[36] Appellant's Brief at 42. He is incorrect.

---

[35] Mašić's reliance on *State v. Teran*, 71 Wn. App. 668, 862 P.2d 137 (1993), is likewise misplaced. *Teran* holds only that a LEP criminal defendant's waiver of his or her *Miranda* right against self-incrimination, to be valid, must be made after advisement of the right in his or her native tongue. *Teran*, 71 Wn. App. at 672. Mašić does not explain how the waiver of constitutional right in *Teran* has any relevance to the notice of the Department decisions on his workers' compensation claim.

[36] Mašić also complains that the Department "refused [his] request for an interpreter to correct his deposition". Appellant's Brief at 42. But he shows no authority or analysis to explain why he has a due process right to have the Department pay for his interpreter to review the translation done by another interpreter Mašić requested the Department to use in a discovery deposition. TR (8/24/05) 20 (Mašić's attorney acknowledged that she requested the use of Brankovan for the Department's deposition).

The court will determine the specific dictates of due process in a particular case by balancing (1) the private interest affected, (2) the risk of an erroneous deprivation of that interest through the procedures used and the value of additional safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens the additional safeguards would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

As to the first *Mathews* factor, although Mašić has a protected interest in his *claim* for benefits, such an interest, no matter how important, is not as great as, and must be distinguished from, a *vested* right to benefits involved in *Mathews*. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (workers' interests in "their claims for payment" are "fundamentally different" from a *vested* right to benefits); *Lander v. Indus. Comm'n of Utah*, 894 P.2d 552, 555 (Utah Ct. App. 1995) (worker's interest in his claim for benefits "falls short of a vested right to benefits as in *Mathews*"); *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 475, 843 P.2d 1056 (1993) ("Where the Department has neither considered nor determined whether a worker is permanently and totally disabled, that worker has a future expectation of benefits, not a vested right."). Also, his interest must be assessed in light of the fact he will be awarded full retroactive relief if he ultimately

prevails. *See Mathews*, 424 U.S. at 340 (relevant to the first factor analysis was the availability of retroactive relief).

As to the second factor, Mašić fails to show any significant risk of an erroneous decision resulting from the lack of additional interpreter services. California's Supreme Court has rejected a civil, indigent, and represented LEP defendant's due process challenge to the trial court's denial of an interpreter for attorney-client communications, because, as the court proceedings were "controlled by counsel," the defendant was "in no worse position than the numerous represented litigants who elect not to be present in court at all." *Jara v. Municipal Court*, 578 P.2d 94, 96-97 (Cal. 1978). Like the defendant in *Jara*, Mašić was represented by his attorney, and, unlike the defendant in *Jara*, was provided with an interpreter throughout the recorded proceedings. He had a right (which he exercised) to seek judicial review of the Board decision.

As to the third factor, cost is a significant factor when it comes out of a state benefit program with finite funds. *Mathews*, 424 U.S. at 348 (emphasis added). Given the nature of Mašić's claim and the reliable procedural safeguards used (the evidentiary hearing with an interpreter), the value of having free interpreter services for his private conversations with his attorney is simply outweighed by the cost.

Mašić claims that "saving the state money" does not justify "withholding benefits," citing *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 57 P.2d 611 (2002). Appellant's Brief at 43. *Willoughby* involved a substantive (not procedural) due process challenge to a statute that denied disbursement of certain benefits to prisoners who had no statutory beneficiaries and were unlikely to be released from prison, although the prisoners were otherwise eligible for the benefits. *Willoughby*, 147 Wn.2d at 728-730. But, unlike the situation in *Willoughby*, the Department did not, just to save money, deny Mašić any benefits to which he was otherwise entitled because he speaks Bosnian.

3. Mašić fails to show prejudice

To prove a due process violation, Mašić must show actual prejudice. *See Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) ("a violation of due process as the result of an inadequate translation" requires a showing "that a better translation likely would have made a difference in the outcome"); *Kuqo v. Ashcroft*, 391 F.3d 856, 859 (7th Cir. 2004) ("A generalized claim of inaccurate translation, without a particularized showing of prejudice based on the record, is insufficient to sustain a due process claim."); *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997) (due process violation requires actual prejudice); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (same).

Mašić claims that the lack of interpreter services for his private conversations with his attorney resulted in a confusion about how he recalled the date he received the 9/28/04 order. Appellant's Brief at 42. But his assertion was rejected by the Board and the superior court in light of the totality of his testimony and does not demonstrate prejudice. BR 2, 62-72 (App. B), CP 1-3 (App. A); *see also Gutierrez-Chavez*, 298 F.3d at 830 (confusion or mere assertion is insufficient to show prejudice).

K. Mašić Fails to Show an Equal Protection Violation[37]

Mašić argues that the Department's English order violated his equal protection rights. Appellant's Brief at 21-24. He is incorrect.

Equal protection requires, within reason, "that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Seattle Sch. Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 362, 804 P.2d 621 (1991). It "does not require identical treatment of people who are in fact different." *Seattle Sch. Dist.*, 116 Wn.2d at 364. "The standard of review in a case that does not employ suspect classification or fundamental right is rational basis". *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004).

[37] The Department does not engage in separate equal protection analysis under Washington and federal Constitutions, because Mašić does not make such separate analysis or suggest that a greater protection is provided under Washington's with an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Here, the rational basis review applies, because Mašić fails to show any suspect classification or fundamental right. Workers' benefits are "finite resources," not a fundamental right. *Willoughby*, 147 Wn.2d at 739; *In re Grove*, 127 Wn.2d at 238 ("Where as here, the interest at stake is only a financial one, the right which is threatened is not considered 'fundamental' in a constitutional sense.").[38] "Language, by itself, does not identify members of a suspect class." *Soberal-Perez*, 717 F.2d at 41; *Olivo*, 337 N.E.2d at 911 ("The class burdened, however, is not those of Spanish descent, but those unable to read English. This is not a suspect class."); *Valdez*, 783 F. Supp. at 122 (same); *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1137-38 (E.D. Cal. 2004) ("[N]o case has held that the provision of services in the English language amounts to discrimination against non-English speakers based on ethnicity or national origin.").

Under the rational basis test, "there is a presumption of constitutionality," and the classification is upheld "unless it rests on

[38] Mašić argues that he has a constitutional right to travel, citing *Macias v. Department of Labor & Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983). Appellant's Brief at 21-22. But he fails to explain how the Department impinged on his right to travel. *Macias* involved statutory exclusion of seasonal farm workers from benefits unless they earn at least $150 in a calendar year from the employer in whose employ they suffered injury. *Macias*, 100 Wn.2d at 264-265. Noting that the workers "must move farm to farm and state to state" for continual work, *Macias*, 100 Wn.2d at 271, the *Macias* court found the $150 requirement effectively "penalized" them for engaging in farm work (involving interstate travel), when their basic necessities of life depended on their small income from each farm, *id.* at 273. Mašić fails to explain how the Department penalized him for exercising his "right to travel *within* the United States." *Haig v. Agee*, 453 U.S. 280, 306, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981) (emphasis added) (noting a "crucial difference between the freedom to travel internationally and the *right* of interstate travel").

grounds wholly irrelevant to achievement of legitimate state objectives." *Tunstall*, 141 Wn.2d at 226. A classification "will be upheld if *any conceivable state of facts* reasonably justifies the classification." *Tunstall*, 141 Wn.2d at 226 (emphasis added). Mašić "has the burden of proving that the classification is 'purely arbitrary.'" *Id.* at 226.

The courts have consistently upheld the constitutionality, on the equal protection ground, of English notices and services given to a LEP person. *See Carmona*, 475 F.2d at 739 (notice of unemployment benefit denial); *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1026-29 (9th Cir. 1978) (no right to bilingual education); *Frontera*, 522 F.2d at 1218-20 (English-only civil service exam); *Soberal-Perez*, 717 F.2d at 42-43 (social security); *Olivo*, 337 N.E.2d at 911 (condemnation); *Guerrero*, 512 P.2d at 837-839 (welfare benefit).

The choice of the Department to deal primarily in English has a reasonable basis. It is "not difficult for us to understand why [an agency decides] that forms should be printed and oral instructions given in the English language: English is the national language of the United States." *Soberal-Perez*, 717 F.2d at 42; *Frontera*, 522 F.2d at 1220 ("Our laws are printed in English and our legislatures conduct their business in English."); *Olivo*, 337 N.E.2d at 911 ("English is the language of this country."). The "additional burdens on [the state's] finite resources and

[its] interest in having to deal with one language with all its citizens support the conclusion of reasonableness." *Carmona*, 475 F.2d at 739. Equal protection does not "dictate budget priorities by elevating language services over all other competing needs." *Moua*, 324 F. Supp. 2d at 1138.

Mašić complains that the Department provides Spanish-speaking claimants with some services in Spanish. Appellant's Brief at 22. But due process "does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination." *Dandridge*, 397 U.S. at 486 (citation omitted). A classification does not fail rational basis test because "it is not made with mathematical nicety or because in practice it results in some inequity." *Id.* at 485 (citation omitted). The provision of services in Spanish in light of the large number of Spanish-speaking claimants is rational and does not show any invidious discrimination against other language speakers.

Mašić refers to consent decrees apparently entered in unrelated cases, involving the Departments of Social & Health Services (DSHS) and Employment Security (ESD). Appellant's Brief at 23. But consent decrees are not enforceable by or against anyone but the parties to them. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 2184, 104 L. Ed. 2d 835 (1989) ("A judgment or decree among parties to a lawsuit

resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."). The Department of Labor and Industries was not a party to the consent decrees and is not bound by them. Further, the fact the DSHS or ESD provide services per their regulations does not mean the Department of Labor and Industries has a legal duty to do so.[39]

L. Mašić's Policy Argument about Equal Access to Justice Should Be Addressed to the Legislature

Mašić refers to Washington State Civil Legal Needs Study and Equal Access to Justice Report and argues, for the first time before this Court, that somehow the study and report required the Department or the Board to provide free interpreter services to Mašić. Appellant's Brief at 33-34. But these documents were not in the record. The Court should reject Mašić's improper attempt to insert new evidence into the record and raise a new argument for the first time on appeal. *See In re Recall Charges against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) ("This court requires that six conditions [in RAP 9.11(a)] be met before we will take additional evidence on review."); RAP 2.5(a).

Further, Mašić fails to explain how these documents create any enforceable right or obligation. Mašić's policy argument must be addressed to the Legislature, not to this Court.

---

[39] The record is inadequate to assess the level of interpreter services actually provided by DSHS or ESD.

M. There Was No Cost Shifting, and Mašić's Request for Reimbursement of Alleged Out-of-Pocket Costs Is Baseless

Mašić claims that the Department and the Board *shifted* interpreter costs to him and argues that he is entitled to a reimbursement of the interpreter costs he allegedly incurred. Appellant's Brief at 42-43, 45-46.

There was no cost shifting, because, as shown above, neither the Department nor the Board was required to provide further language services than were provided to Mašić. Other expenses he allegedly incurred are his own or overhead costs of his attorney. Also, costs (and attorney fees) cannot be awarded in a workers' compensation appeal except at the court level to a party prevailing on the merits, only for attorney fees incurred at court, not all costs incurred at the Board, and no costs incurred at the Department level. RCW 51.52.130 (fourth sentence); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889, 86 P.3d 1231 (2002) ("The statute contains 'no provision for the recovery of attorney's fees from or payable by the department for services rendered before the board.'"), *review denied*, 152 Wn.2d 1032 (2005). Because Mašić did not prevail at the superior court, he is not entitled to a cost award.

Mašić's reliance on *Kenworthy v. Pennsylvania Gen. Ins. Co.*, 113 Wn.2d 309, 779 P.2d 257 (1989), is misplaced. *Kenworthy* involved the interpretation of the uninsured motorist (UIM) statute and is inapposite

here. In any event, the court held that a clause in a UIM policy requiring an insured to pay the arbitration cost was void under the UIM statute but carefully stated "that costs such as fees for expert witnesses hired by a party and claimant's attorney fees . . . are distinguishable because they are normally associated with recovery in civil litigation between an injured party and an insured motorist, and would be assumed voluntarily." *Kenworthy*, 113 Wn.2d at 315. Mašić and his attorney voluntarily incurred the alleged interpreter expenses associated with his claim.[40]

N. The Superior Court Properly Granted the Department the Cost of $200 Attorney Fees Pursuant to Chapter 4.84 RCW

Mašić challenges the superior court cost award of statutory attorney fees to the Department. Appellant's Brief at 46-50. But our Supreme Court has rejected this challenge and approved the cost award to the Department under RCW 51.52.140 and Chapter 4.84 RCW. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557-558, 933 P.2d 1025 (1997); RCW 51.52.140 (except as otherwise provided, "the practice in civil cases shall apply"); RCW 4.84.030 (in superior court case, "the prevailing party shall be entitled to his or her costs and disbursements"); RCW 4.84.080(1) ("costs to be called the attorney fee" where judgment is rendered are

[40] Mašić also refers to a "Model Court Interpreter Act," without providing a citation. Appellant's Brief at 42-43. He fails to explain why any "Model Court Interpreter Act" is of any relevance, where Washington's interpreter statute, Chapter 2.43 RCW, has specific cost-allocating provisions, RCW 2.43.040(2), (3).

$200); *Allan*, 66 Wn. App. at 423 ("The Department as prevailing party is entitled to its statutory costs including statutory attorney fees.").

Mašić claims *Black* is wrong, but "once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." *Johnson*, 87 Wn.2d at 927. Our Supreme Court's reading of RCW 51.52.140 in *Black* to allow costs under RCW 4.84 has not been overruled or superseded and must thus stand.

O. Any Attorney Fee Award to Mašić Must Be Contingent on the Accident Fund Being Affected by the Decision

A reasonable attorney fee award to a prevailing worker "payable out of the [Department's] administrative fund" derives from the fourth sentence of RCW 51.52.130. *Piper*, 120 Wn. App. at 889-891. Thus, if Mašić prevails in this case, any award to him would have to be made contingent on whether "the accident fund or medical aid fund [were] affected" by the court decision. RCW 51.52.130.

///

///

///

VI. CONCLUSION

For the reasons stated above, the Department requests that the Court affirm the superior court judgment.

RESPECTFULLY SUBMITTED this 10th day of December, 2007.

ROBERT M. MCKENNA
Attorney General

Masako Kanazawa

Masako Kanazawa, WSBA #32703
Assistant Attorney General
800 5th Avenue
Seattle, WA 98104-3188
(206) 389-2126

APPENDICES A-H

APPENDIX A

Superior Court Judgment

Please

Denied
~~Attorney~~
~~Ex 3.9.07~~
9:00a.m

07 MAR -5 PM 3:34

KING COUNTY
SUPERIOR COURT

4
MAY 2007
Resident
KING COUNTY DIVISION
LC

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

FERID MASIC,

Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON,

Defendant.

NO. 06-2-17514-0 KNT

~~(PROPOSED)~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	Ferid Masic
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Statutory Attorney Fees:	$200.00
6. Costs:	$0
7. Other Recovery Amounts:	$0

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

original
COPY

EY GENERAL OF WASHINGTON
OR & INDUSTRIES DIVISION
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

EXHIBIT A

10. Attorney for Judgment Creditor: Andy Simons
Office of the Attorney General
900 fourth Avenue
Seattle, WA 98164

11. Attorney for Judgment Debtor: Ann Pearl Owen
Attorney at Law
2407 14th Avenue South
Seattle, WA 98144

This matter came on regularly before the Honorable Laura Inveen, in open court on March 9, 2007. Appellant, Ferid Masic, appeared with counsel, Ann Pearl Owen; the Defendant, Department of Labor and Industries (Department), appeared by counsel, Robert M. McKenna, Attorney General, per Andy Simons, Assistant Attorney General. The Court reviewed the records and files herein, including the Certified Appeal Board Record and briefs submitted by counsel, as set out in the attachment hereto, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) and testimony of other witnesses was perpetuated by deposition. The Industrial Appeals Judge issued an initial Proposed Decision and Order on April 13, 2006 from which Plaintiff filed a timely Petition for Review. The Board denied Plaintiff's Petition for Review, and on May 23, 2006, ordered that the Proposed Decision and Order become the Decision and Order of the Board. Plaintiff thereupon timely appealed the Board's Decision and Order to this Court.

1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 2 through 4. The Court adopts as its Findings of Fact, and incorporates by this reference the Board's Findings of Facts Nos. 2 through 4 of the May 23, 2006 Decision and Order which adopted the April 13, 2006 Proposed Decision and Order.

1.3 The fifth paragraph of Board Finding of Fact No. 1 states: "On December 7, 2004, the Board of Industrial Insurance Appeals received a notice of appeal filed on behalf of the claimant from the Department order dated September 28, 2004." This finding is not material, as Finding of Fact Number 3 correctly states that claimant filed his notice of appeal on December 6, 2006. Therefore, with the exception of paragraph 5, which is struck, the Court adopts Finding of Fact No. 1, and incorporates by this reference the modified Findings of Facts Nos. 1 of the May 23, 2006 Decision and Order which adopted the April 13, 2006 Proposed Decision and Order.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 The Board's Conclusions of Law Nos. 1 through 3 are correct. The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 3 of the May 23, 2006 Decision and Order which adopted the April 13, 2006 Proposed Decision and Order.

2.3 Neither the Department nor the Board violated any of Mr. Masic's statutory rights or due process or equal protection rights under the U.S. or state constitutions regarding interpreter services, nor is Mr. Masic entitled to equitable relief from the time bar of RCW 51.52.060.

2.4 The Board's Decision and Order of May 23, 2006, except as modified in Finding of Fact No. 1, is correct and is affirmed.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

3.1 It is hereby ORDERED, ADJUDGED AND DECREED that the May 23, 2006 Board of Industrial Insurance Appeals Decision and Order, that adopted the April 13, 2006 Proposed Decision and Order that affirmed the Department's September 28, 2004 order that affirmed the Department's April 13, 2004 order that rejected Mr. Masic's claim should be and is hereby affirmed as modified.

DATED this 14 day of ~~March~~ May, 2007.

Laura Inveen

Laura Inveen, JUDGE

Presented by:
ROBERT M. MCKENNA
Attorney General

ANDY SIMONS
Assistant Attorney General
WSBA No. 30186

APPENDIX B

Board Decision

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.biia.wa.gov
(360) 753-6824

In re: **FERID MASIC**	Docket No. 04 25602
Claim No. Y-900479	**ORDER DENYING PETITION FOR REVIEW**

A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **MITCHELL T. HARADA** on **April 13, 2006**. Copies were mailed to the parties of record.

A Petition for Review was filed **by the Claimant on May 4, 2006**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated this 23rd day of May, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Thomas E. Egan

THOMAS E. EGAN Chairperson

Calhoun Dickinson

CALHOUN DICKINSON Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

BEFORE TH BOARD OF INDUSTRIAL INSUR CE APPEALS
STATE OF WASHINGTON

IN RE: FERID MASIC) DOCKET NO. 04 25602
)
CLAIM NO. Y-900479) PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: Mitchell T. Harada

APPEARANCES:

Claimant, Ferid Masic, by
Ann Pearl Owen, P.S., per
Ann P. Owen

Employer, Seattle Concrete Design, by
Hecker Wakefield & Feilberg, P.S., per
Stephan D. Wakefield

Department of Labor and Industries, by
The Office of the Attorney General, per
Andrew J. Simons, Assistant

The claimant, Ferid Masic, filed an appeal with the Board of Industrial Insurance Appeals on December 7, 2004 from an order of the Department of Labor and Industries dated September 28, 2004. In this order, the Department affirmed a prior order dated April 13, 2004. The claimant's appeal is **DISMISSED**.

PRELIMINARY MATTERS

On October 25, 2005, a hearing to address the issue of subject matter jurisdiction was held in Seattle, Washington. That hearing was continued to November 9, 2005 in order for all evidence to be presented by all parties. On November 18, 2005, a conference was held at which I made an oral ruling. In my ruling, I stated that I found that the claimant filed a notice of appeal from the September 28, 2004 Department order within sixty days from the date the order was communicated to him as required by RCW 51.52.060. I, therefore, made a finding that the Board of Industrial Insurance Appeals has personal and subject matter jurisdiction to hear the claimant's appeal.

During my ruling, I further stated the reasons for my determination on jurisdiction. Essentially I indicated that I believed the claimant when he testified that he received the September 28, 2004 Department order from a neighbor, who received and opened the envelope in which the order was sent because it was mistakenly placed in his mailbox. I placed a great deal of emphasis on the fact that the claimant testified he specifically recalled the date he received the order (Saturday, October 9, 2004) because it was the same day he learned that his mother died. At

the time of my oral ruling I indicated that I was persuaded by the claimant's testimony because I found it reasonable to believe the claimant could and would recall what transpired on the day he learned his mother had passed away (in a call from family member from Bosnia, where the claimant's mother purportedly lived).

After having made my ruling on jurisdiction, I scheduled hearing dates to take evidence on the hearing on the merits. On November 18, 2005, I also issued an Interlocutory Order Establishing Jurisdiction.

On December 13, 2005, employer filed Seattle Concrete Design's Motion For Order To Show Cause Why The Court's Jurisdictional Ruling Should Not Be Reversed. On December 22, 2005, employer filed a Motion for Contempt; a Supplement to Motion For Order To Show Cause; and an Objection to Continue Hearing. Claimant's counsel filed many documents to contest employer's motions. Suffice it to say that most of the pleadings were supplemented with records and declarations of individuals to address the employer's assertion that claimant was untruthful when he testified that his mother died.

The employer's position is that the Board has authority under CR 60 or CR 54 to amend its ruling on jurisdiction – even nearly five weeks post hearing. Specifically, employer relies on CR 54(b), which states in pertinent part:

> (b) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

A conference was held on February 1, 2006 to further discuss the motions filed by employer and whether a show cause hearing would be necessary. During that conference I determined that I would issue a new order to address jurisdiction, that no further hearings in regards to jurisdiction would be held; and that I would not allow any additional filings on the issue of jurisdiction after the

date of the conference, February 1, 2006. To the extent that additional documents were filed, they were not considered for purposes of issuing this decision.

ISSUE

Whether the claimant filed a timely protest and request for reconsideration or appeal from the Department of Labor and Industries order dated April 13, 2004.

EVIDENCE PRESENTED

A jurisdictional hearing was held originally on October 25, 2005; the hearing was continued to November 9, 2005 in order for all confirmed witnesses to be able to testify fully.

At the time of his injury, the claimant, Ferid Masic, lived in an apartment in Tukwila, Washington. Since that time he has moved to a different address in Tukwila. He lives there with his wife and two children. Mr. Masic arrived in this country in 1999 from the former Yugoslavia where he learned his native language of Serbo-Croatian. Mr. Masic testified that when he arrived in the United States speaking Bosnian, and did not speak English.

Mr. Masic enrolled in an English as a Second Language (ESL) course at Renton Technical College in Renton, Washington. Mr. Masic testified that "they put me in a class where I did not understand anything. I came twice and after not understanding I basically left and did not continue study." 10/25/05 Tr. at 14. When Mr. Masic reviewed a copy of his application for benefits in this case, he said that "he [the interpreter] filled out this form because I don't speak English. I cannot read English." 10/25/05 Tr. at 20. Mr. Masic utilized the services of Ruslan Tumbic to assist in writing letters on his behalf in regards to this claim; those letters type-written were typed by Mr. Masic's wife.

Mr. Masic testified that he did not receive the September 28, 2004 order on appeal (Exhibit No. 5) until about ten days after the date of the Order. He believes the day he received the order was a Saturday, and the date of his receipt was October 9, 2004 or October 10, 2004. (A review of a 2004 calendar indicates that October 9, 2004 was a Saturday). The claimant testified that he received the (opened) envelope containing the September 28, 2004 Department order from a neighbor who lived in the same apartment complex as he. The neighbor explained that he was absent and when he returned and opened the mail, the neighbor also opened the envelope mailed to Mr. Masic. When testifying, Mr. Masic could not provide the identity of this neighbor who supposedly received this one envelope by mistake; neither could he provide the unit number where this individual lived. Mr. Masic said that after he received the Department order dated September 28, 2004, someone speaking English (was present) and translated it for him. Mr. Masic

testified that after it was translated, "he asked her to call a lawyer for [him] to make an appointment." 10/25/05 Tr. at 34. Mr. Masic then stated that he received his attorney's notice of appeal in the mail. It appears that the lawyer sent the document on December 6, 2004, and presumably it was received by the Board of Industrial Insurance Appeals on December 7, 2004.

After discussion about the nature of the evidence presented by the claimant, the jurisdictional hearing was continued to November 9, 2005 for cross-examination and to provide additional time for the employer and Department to further prepare its defense.

On November 9, 2005, Mr. Masic testified, more about the specifics of receiving the September 28, 2004 order from his apartment complex neighbor. Mr. Masic was then asked whether his wife saw the man who delivered the order (neighbor), and he answered she did. Then this discussion took place:

Q: Did she know him?

A: Yes, she did. She was there. And that was the day that I was really ... [chagrined].

A: I will always remember that day.

Q: Why were you chagrined?

A: My mother died.

Q: Your mother died on October the 9th?

A: Yes. They told me. They called me from Bosnia and told me she died.

11/9/05 Tr. at 224, 225.

Mr. Masic further testified that he had the assistance of an interpreter when taking and passing the written portion of the state driver's license examination. He also addressed the CDL requirements and stated that 90 percent of the practical portion of the examination dealt with hand signals.

During the hearing held on November 9, 2005, John Chadwick testified that he is the Dean of basic studies at Renton Technical College where he, as part of his duties, oversees English as a Second Language (ESL) classes. Mr. Chadwick testified that the claimant registered for a property management class after having been tested to determine his level of English proficiency. He said that Mr. Masic took a Comprehensive Adult Student Assessment Test (CASAS), which is used to determined one's employability level. Mr. Masic tested at Level 5 (with the range from 1 to 6, with 6 being the highest level). Mr. Chadwick clarified that this would mean that Mr. Masic would understand almost everything said to him, and that he would be understood almost all of the time by an English speaking person.

The next witness was Marcia Arthur, and ESL teacher at Renton Technical College. Ms. Arthur has over twenty years of experience in teaching ESL courses. During her testimony she provided her opinions on what level of English competency one would need in order to comprehend certain legal documents, including the Department of Labor and Industries Decision and Order of April 13, 2004. Ms. Arthur was of the opinion that a Level 4 ESL student would, with use of a dictionary for a small number of words, be able to comprehend most of the contents of the Order. Ms. Arthur stressed that the language contained in the order is relatively formal and would put the reader on notice that legal action is involved.

Gibb Kingsley manages the commercial driver's license program with the Department of Licensing in this state. Mr. Kingsley testified to the requirements for one to receive a commercial driver's license (CDL) for drivers to operative very large vehicles, typically those above 26,000 pounds that include combination vehicles and buses. The applicant for a CDL is required to pass a written examination, which can be administered in the applicant's native language, and a vehicle inspection test, which is given exclusively in English. Mr. Kingsley explained that the hands-on vehicle inspection portion of the examination is given only in English because it is essential for the applicant/driver to communicate crucial information in English in case of an emergency. Mr. Kingsley also testified that Mr. Masic obtained a CDL in Washington State on July 29, 2001.

Mike Bethany, a senior technical specialist for the Department of Licensing, also testified on behalf of the Department of Labor and Industries on November 9, 2005. Mr. Bethany described the testing process for one seeking a Washington State driver's license (non-commercial). He said that the Bosnian language is not one of the non-English languages in which the written examination is administered. Mr. Bethany confirmed that the claimant received his driver's license on January 18, 2000.

As stated previously, when the employer filed its Motion to Show Cause, the motion contained several attachments that was filed to establish that the claimant's mother was not dead. She may have been ill, but that was not near in time to October 9, 2004. Claimant's counsel filed several other documents to counter employer's assertions; however, the claimant did not deny that his mother was actually alive. The main argument of claimant was essentially that when he testified about his mother, claimant actually said dying and not dead. The claimant argues that the confusion was caused by there being less than accurate translation provided for during the jurisdictional hearings.

DECISION

The sole issue in this appeal is whether the claimant filed a notice of appeal from the Department order dated September 28, 2004 within sixty days of the date the order was communicated to the claimant pursuant to RCW 51.52.060.

The particular statue that addresses the time frame for a party to file a protest or appeal from a Department order is RCW 51.52.060, which states in pertinent part:

> § **51.52.060.** Notice of appeal -- Time -- Cross-appeal -- Departmental options
>
> (1) (a) Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board ...

The law is well established that failure to file an appeal within the time prescribed by statute prohibits this Board from considering the merits of an appeal and that the burden is on the appellant to prove that the appeal was timely. *In re John Karns,* BIIA Dec., 05,181 (1956) citing *Nafus v. Department of Labor & Indus.*, 142 Wash. 48.

There was no issue raised about whether the Department actually issued the order of September 28, 2004 on that same day. Neither the Department nor the employer called a witness to establish such a fact. However, the presumption is that the government mails proceed in due course, and that a letter duly addressed to a person, with the postage thereon fully paid, is received by the person to whom it is addressed. This presumption has the force of evidence, and is sufficient to justify a finding that such is the fact, in the absence of anything to the contrary. *Avergionion v. First Guaranty Bank*, 142 Wash. 73 (1927).

If the order was issued on September 28, 2004, and the usual course of government mails from Olympia to Tukwila is at most three business days, this would mean in the ordinary course of mail handling, the order of September 28, 2004 would have been delivered to the claimant's address no later than October 1, 2004. The first question becomes when did the claimant receive the order; the next question is when was the order actually communicated to him.

Previously, I found the claimant credible when testifying that he received the order on October 9, 2004 from his neighbor. During that same stretch of testimony it was implicit that the claimant had someone nearby (a female) who translated the order on the same day. Besides that

portion of his testimony that focused on October 9, 2004, the claimant recalled other relevant dates rather poorly. But, the claimant appeared credible to me at the time because I found it reasonable that his recall would be complete and accurate about the events that occurred on the day he learned his mother died. Despite the existence of many irregularities and inconsistencies between the claimant's testimony and that provided by other witnesses, I gave the benefit of the doubt to Mr. Masic about his mother's condition. I also stated during my oral ruling that I could vividly recall the claimant's demeanor and presence change when he mentioned that his mother died. I felt that his body language and his tone of voice (in Bosnian) were consistent with someone recalling the date one learns his mother dies.

The evidence presented by the employer raises no doubt that Mr. Masic's mother was alive and living in Bosnia on or about November 9, 2004. (Even in the claimant's responses, there is no denial of the mother being alive). Clearly, with this new information, the basis for my initial ruling on jurisdiction was made relying on false testimony.

After considering the new evidence about the status of claimant's mother, in determining whether the claimant filed a timely appeal of the September 28, 2004 Department order, as before, much of my determination rests on the claimant's overall credibility.

The issue of the ability of the claimant's ability to communicate in English was a central focus of the evidence presented at jurisdictional hearing. The claimant essentially contends that he cannot read, write, speak, or understand English. The employer and Department presented evidence from unbiased witnesses to contradict that contention. Their collective testimony indicates that the claimant passed tests (CDL) and scored high enough (with ESL) to indicate the claimant's level of communicating in English is above that which he claims.

Given the new information about the claimant's mother, the surrounding circumstances of when he claims he received the September 28, 2004 order cause me to be much more suspicious. The claimant's unexpected testimony about when he received the order on appeal conveniently fell within sixty days of when his attorney actually filed the appeal (even though the justification for late filing is noted in the notice of appeal, and even though the claimant earlier testified about now knowing much about appeal periods with other claims). The claimant is also unable to recall the identity of the neighbor who dropped by with his mail and does not volunteer any information about how one may learn of his identity. The claimant also elected not to have his wife testify at the jurisdictional hearing to corroborate the delivery from this neighbor and when that may have occurred. (It is also interesting that the claimant just happened to have a female translator present

on October 9, 2004 when his neighbor delivered the Department order to Mr. Masic, although this same translator was not present during other important times).

One other point brought up by counsel for the employer and Department, was that in the notice of appeal of December 6, 2004, claimant indicates that it is "Not Known" when the claimant received the September 28, 2004 Department order. However, in that same notice of appeal (Exhibit No. 7), claimant implies an admission of there being (at least on its face) non-compliance with the sixty day appeal period. Up to the date of the October 25, 2004 jurisdictional hearing, claimant proceeded under the apparent theory that the claimant did not comply with the requirements of RCW 51.52.060 because the order was not written in the claimant's native language of Bosnian/Serbo-Croatian. It appeared to be with great surprise to the undersigned (and counsel for the employer and Department) when the claimant volunteered that he did not actually receive the September 28, 2004 order until October 9, 2004; this revelation made what appeared to be the main issue – the issue of translation -- become essentially irrelevant. This last-minute change in theories of his case was understandable when I believed that the claimant could recall the exact date of his receipt of the September 28, 2004 order; however, now that the circumstances for me believing the claimant on his ability to recall the exact date never actually existed, I not only question the claimant's ability to recall the date he received the order, but also his ability to be truthful on any matter.

I truly believe that the claimant's level of understanding and communicating in English is far greater than he leads on. When the claimant was asked to describe his ability to use English, and he replied, "very, very – it's very, very difficult," I believe the claimant was not truly honest with his response. 10/25/05 Tr. at 13. The claimant did not have any witnesses testify to his supposedly low level of English comprehension, so we are left to believe him that he has great difficulty communicating in English. Based on the totality of the testimony, I find it much easier to believe totally unbiased educators and state agency representatives who describe what skill level of English communication is required for someone with Mr. Masic's certifications and school entry scores.

Claimant argues that the misinformation about the status of the mother of Mr. Masic is easily explained by considering inaccurate translation when Mr. Masic testified in Bosnian and an interpreter (of a different cultural background than the claimant) translated into English. Such an argument, taken on its own, has merit. But taken in consideration of the other testimony and my observations during the time Mr. Masic testified about his mother having "died," leads me to

conclude that the misinformation was not the fault of the interpreter. I mentioned previously of my observations of the claimant's demeanor when he testified his mother "died." The context of his testifying that she "died" makes it appear that his choice of words would make it more reasonable that he said "died" and not "dying." The hearings held on October 25, 2005 and November 9, 2005 were full of discussions among all participants in regards to problems with the interpreter either keeping up or fully comprehending what the claimant was saying. Even the claimant would bring up when he felt communication was a problem. During the time when the claimant testified about his mother, there were no problems with pace of speech, and there were no problems about choice of words. In fact, because of the subject matter, I recall there was a slowing of the pace of testimony (that could not be picked up by merely reading the transcript). Overall, the claimant's explanation about translation is not persuasive.

FINDINGS OF FACT

1. On or about March 23, 2004, the claimant, Ferid Masic, filed an application for benefits with the Department of Labor and Industries in which he alleged he sustained an injury to his left leg and left arm on June 29, 2003 while working in the course of his employment with Seattle Concrete Design.

   On April 13, 2004, the Department of Labor and Industries issued an order in which it rejected the claim; stated that the Department of Labor and Industries is unable to substantiate an employer/employee relationship; and stated that all bills concerning this claim are rejected except those authorized by the Department of Labor and Industries for diagnosis.

   On or about May 11, 2004, the claimant filed a protest and request for reconsideration from the Department order dated April 13, 2004.

   On September 28, 2004, the Department issued an order that affirmed the prior order dated April 13, 2004.

   On December 7, 2004, the Board of Industrial Insurance Appeals received a notice of appeal filed on behalf of the claimant from the Department order dated September 28, 2004.

   On December 29, 2004, the Board of Industrial Insurance Appeals issued an Order Granting Appeal (subject to proof of timeliness), assigned the appeal Docket No. 04 25602, and ordered that further proceedings be held.

2. By no later than October 1, 2004, the Department order dated September 28, 2004 was communicated to the claimant in a manner whereby the claimant was able to understand and comprehend its contents.

3. On December 6, 2004, the claimant filed his notice of appeal from the Department order dated September 28, 2004.

4. The claimant failed to file a notice of appeal from the September 28, 2004 Department order within the time frame required by RCW 51.52.060.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to this appeal.

2. The claimant's notice of appeal filed with the Board on December 6, 2004, was not timely filed from the Department order dated September 28, 2004, as contemplated by RCW 51.52.060.

3. The Board does not have jurisdiction over the subject matter to this appeal. The appeal is dismissed.

It is so **ORDERED**.

DATED: APR 13 2006.

Mitchell T. Harada
Industrial Appeals Judge
Board of Industrial Insurance Appeals

21

APPENDIX C

9/28/04 Order

09-28-04 SC1 2318:40

PRVDR OVERLAKE HOSPITAL MEDICAL CTR
1035 116TH AVE NE
BELLEVUE WA 98004-4604

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
OLYMPIA, WA. 98504

EMP

CLAIM ID : Y900479 TYPE : RE
MAILING DATE : 09-28-04 WRKPOS : PM75
INJURY DATE : 06-29-03 UNIT : E
SERVICE LOCATION : SEATTLE
ACCOUNT ID : 0-00
CLASS : 0000

CLMT FERID MASIC
3434 S 144TH ST APT 133
SEATTLE WA 98168

NOTICE OF DECISION

|| ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA WA 98504-2401 WITHIN 60 DAYS AFTER YOU RECEIVE THIS NOTICE, OR THE SAME SHALL BECOME FINAL. ||

THE DEPARTMENT OF LABOR AND INDUSTRIES HAS RECONSIDERED THE ORDER OF 04-13-04.
THE DEPARTMENT HAS DETERMINED THE ORDER IS CORRECT AND IT IS AFFIRMED.

SUPERVISOR OF INDUSTRIAL INSURANCE

BY BELVA L SHOOK

ACCOUNT MANAGER

FILE COPY

APPENDIX D

4/13/04 Order

VDR OVERLAKE HOSPITAL MEDICAL CTR
1035 116TH AVE NE
BELLEVUE WA 98004-4604

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
OLYMPIA, WA. 98504

MP

CLAIM ID : Y900479 TYPE : RJ
MAILING DATE : 04-13-04 WRKPOS : PM75
INJURY DATE : 06-29-03 UNIT : E
SERVICE LOCATION : SEATTLE
ACCOUNT ID : 0-00
CLASS : 0000

MT FERID MASIC
3434 S 144TH ST APT 133
SEATTLE WA 98168

NOTICE OF DECISION

| YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER:
| THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA, WA 98504-2401.

THIS CLAIM FOR BENEFITS IS HEREBY REJECTED FOR THE FOLLOWING REASON(S):

THE DEPARTMENT IS UNABLE TO SUBSTANTIATE AN EMPLOYER-EMPLOYEE RELATIONSHIP AT THE TIME OF YOUR ALLEGED INJURY.

ANY AND ALL BILLS FOR SERVICES OR TREATMENT CONCERNING THIS CLAIM ARE REJECTED, EXCEPT THOSE AUTHORIZED BY THE DEPARTMENT FOR DIAGNOSIS.

SUPERVISOR OF INDUSTRIAL INSURANCE

BY BELVA L SHOOK

POLICY MANAGER

CLAIMANT COPY

Board of Industrial Insurance Appeals
In re: Masic
Docket No. 04 25602
Exhibit No. 3
X ADM. 10/25/05 Date ☐ REJ.

EXH 3

APPENDIX E

Masic's Protest

DEPARTMENT OF LABOR AND INDUSTRIES
P.O.BOX 44291
OLYMPIA,WA,98504-4291

FERID MASIC
3434 S.144TH ST # 133
SEATTLE,WA 98168

CLAIM ID: Y900479

TO WHOM THIS MAY CONCERN.

I received your decesion,mailed on 04-13-2004 and I would like you to reconsider it.

I worked with "SEATTLE CONCRETE DISING" (Owner Muhamed Hadzimuratovic ,License # SEATTCD982K2)in 2003. I gave him my social security number on his request .I earned $ 3000.00,with him not witholding my taxes.
He told me that my benefits will start after six months.(I started in February 2003) with all this I considered myself as an employee of this employer.
I did not have an access to his records to see if he reported me to the department of labor and industries on 03-15-2004.
I filed my tax return,where with my other job I reported my income from "Seattle Concrete Desing"(see attached).
Because of my injury I had to undergo big surgery,extensive treatment I suffered a finacial loss.
Again,I dont know (and Didnt know) any administrative relationships,employer-amployee relationship and since I was a worker in that company I think(and thougt) that I have all rights as his other employees.
Therefore I am asking you to take your decesion in recosideration and Open my claim.

THANK YOU

MAY, 08-2004

FERID MASIC

Board of Industrial Insurance Appeals
In re: Masic
Docket No.. 0425602
Exhibit No.. 4
ADM. 10/25/05 Date REJ.

EXH 4

APPENDIX F

Notice of Representation

NOTICE OF REPRESENTATION & DIRECTION TO PROVIDE COPY OF FILE

To: Department of Labor & Industries

RE: Injured Worker: Ferid Masic
Claim No: Y900479

Please take notice that the undersigned has hired:

Ann Pearl Owen
2407 – 14th Avenue South
Seattle, WA 98144
(206) 624-8637]

to represent the undersigned on all matters regarding the above injured worker on the above and any other claim on all Industrial Insurance matters. Further the Department is hereby specifically instructed to issue all communications to me in care of the above named lawyer at the above address AND to provide my lawyer a copy of all documents related to the above numbered claim file.

Dated this 28TH th day of OCTOBER, 2004.

Ferid Masic

Injured Worker: Ferid Masic

Form Signed in the Presence of and Interpreted by:

Interpreter

Board of Industrial Insurance Appeals
In re: Masic
Docket No.. 04 25602
Exhibit No.. 6
ADM. 10/25/05 Date REJ.

EXH 6

APPENDIX G

Masic's Notice of Appeal

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FERID MAŠIĆ	)	DOCKET NO.:
	)	
CLAIM NO. Y900479	)	NOTICE OF APPEAL OF ALL DEPARTMENT
	)	ACTION/INACTION RE CLAIM INCLUDING BUT
	)	NOT LIMITED TO ORDERS OF 9/28/04 & 4/13/04

The Injured Worker, Ferid Mašić, appeals the subject decisions/orders/failure to make decisions/orders of the Department of Labor and Industries noted below stating:

1. **Injured Worker's Residence Address:**

3434 South 144th Street Apartment 133, Seattle, WA 98168

2. **Subject Department Action/Letters/Determinations/Decisions/Orders:**

The Injured Worker, Ferid Mašić, appeals all Department action/letters/determinations/ decisions/orders, including the 9/18/04 and 4/13/04 orders, including before and after those dates.

NOTA BENE: All of the above referenced letters, decisions, and/or orders are in English. The Injured Worker is a an individual with a non-English-speaking cultural background whose is not fluent in English in either expressive or receptive oral or written language and, thus, one whose ability to read English is inadequate to understand the orders referenced, especially any notification contained in any letter, decision and/or order indicating any appeal requirements. The Injured Worker was not provided any of the above letters, decisions, and/or orders in his native language, Bosnian/Serbo-Croatian. Because of the above and the fact that the Department never explained to the Injured Worker what his rights under the Act were in his own language or the nature of any action, decision, order, request for information, and/or letter were, what action must be taken by him or what information was required of him, or what benefits he was entitled to under the law of Washington, he did not understand that failure to appeal from any of the above referenced orders within 60 days might operate as a waiver of any waive appeal rights concerning the issues decided in those orders.

The Injured Worker has never waived his right to translation services under RCW 2.42 and 2.43 regarding communications from the agency in question – The Department of Labor & Industries. The Injured Worker, Ferid Mašić, is of non-English speaking cultural background.

FIRST NOTICE OF APPEAL TO B

ANN PEARL OWEN, P.S.
2407 – 14TH Avenue South
Seattle, WA 98144
(206) 624-8637

Board of Industrial Insurance Appeals
In re: Masic
Docket No.: 04 25602
Exhibit No.:
☒ ADM. 10/25/05 Date ☐ REJ.

EXH 17

At no time the Department of Labor & Industries communicated with the Injured Worker in his native language. At no time did the Department of Labor & Industries make any effort to inform the Injured Worker of the need to take action within a given period of time in his own language. At no time did the Department of Labor & Industries determine whether or not the Injured Worker understood written English, could effectively read English, understood any decision, order, letter, request for information or description of rights or duties under the Industrial Appeals Act available in or sent to him in English.

When the Injured Worker protested the Department's determinations and requested through counsel that the Department provide his lawyer a full copy of his file and provide him translation services so that he could understand his rights and obligations under the Industrial Insurance Act and play an active and knowing role in his claim determination or appeal, the Department failed to provide any copy of the Injured Worker's file to his counsel and failed/refused to provide any translation services to the Injured Worker, further depriving him of the ability to exercise his rights under the Industrial Insurance Act. The Department even failed to provide the Injured Worker with an English copy of its own interpreter provider services bulletin that purports to informs individuals about the rights to intepreter for non-English speaking injured workers under the Department's interpretation under the Act. The Department's refusal to inform the Injured Worker of his rights under the Act, failure to provide his legal representative a copy of his claim, failure to respond to the Injured Worker's letter of protest, and failure to provide a response to the Injured Worker's request for interpreter services violates the Industrial Insurance Act and deprives the Injured Worker of his rights under the Act, including his right to appeal letters, decisions, determinations, and orders under the Act without due process and in violation of the Act, the State Constitution, RCW 2.42 and RCW 2.43.

The Department's policy on interpreter services, as indicated in its service provider bulletin, violates the stated purposes and aims of the Industrial Insurance Act to protect the Injured Worker against the financial problems that arise from industrial injuries, including such very expensive services as interpreter services necessary only to deal with the results of the industrial injury, including the Injured Worker's right to pursue benefits and the nature of benefits available under the Act.

The undersigned and the Injured Worker have sought and are unable to find any available free translators for this particular language variously known as Bosnian or SerboCroatian.

3. **Subject Department Communications/Actions Received in English:**

Department Communications/Actions:	**Date of Receipt in English:**
All Communications Dates Not Known	Not Known
April 13, 2004 Order*	Not Known
September 28, 2004 Order**	Not Known
Failures/Refusals post 9/28/04	Never

ANN PEARL OWEN, P.S.
2407 – 14TH Avenue South
Seattle, WA 98144
(206) 624-8637

4. **Date Of Receipt Of Department Communications/Actions In IW's Native Language:**

Department Communications/Actions:	**Date of Receipt in Bosnian/Serbo-Croatian:**
All Communications Dates Not Known	Never
April 13, 2004 Order*	Never
September 28, 2004 Order**	Never
Failures/Refusals post 9/28/04	Never

5. **Place of Injury:** On job site near Factoria in King County, Washington.

6. **Name and Address of Employer:** Seattle Concrete Design, 3434 South 144th Street #301, Seattle, WA 98168

7. **Nature of Injury:** Severe circular saw lacerations to left arm and leg with serious hemorrhage, muscle damage, fear of death, permanent disfiguring scarring, atrophy, chronic pain, and limitation of strength with on-going psychiatric problems including intrusive thoughts of injury, fear of death, sleep problems, change in personality, depression, increased irritability, introversion, loss of sociability, altered relationships with wife and children, possible post traumatic stress disorder.

8. **Date of Injury:** June 29, 2003

9. **Relief Sought:** Reversal of orders dated April 13, 2004, September 28, 2004, orders and/or decisions [whether written or not] doing the following:

1. Denying payment of medical expenses
2. Denying any and all benefits under the Act
3. Apparently finding no employer-employee relationship [4/13/04 order]
4. Affirming 4/13/04 order [9/29/04 order]
5. Refusing/failing to provide copy of claim file to counsel
6. Refusing/failing to respond to request for copy of claim file for attorney
7. Refusing/failing to provide interpreter services under the Act
8. Refusing/failing to provide intepreter services requested by letter of 11/1/04
9. Refusing/failing to respond to request for interpreter services
10. Refusing/failing to provide information on rights under the Industrial Insurance Act
11. Refusing/failing to communicate in a language which the injured worker understands
12. Refusing/failing to pay for medical services for treatment of the injured worker's injuries
13. Refusing/failing to take action on the injured worker's protest/request for reconsideration of the order of 9/28/04 within one month of the request communicated to the Department by fax on 11/1/04 indicating why Department's determination in that order was incorrect

ANN PEARL OWEN, P.S.
2407 – 14TH Avenue South
Seattle, WA 98144
(206) 624-8637

14. Any and all other action taken by the Department on this claim
15. Adopting the Interpreter Services Policies of the Department treating non-English speaking injured workers differently and less favorably than English speaking injured workers or than non-English speaking/Spanish-speaking injured workers for whom the Department has communications in Spanish, while not providing any communications with the Injured Worker in his own language.

10. Basis for Relief Sought: The letters, actions, determinations, decisions and orders, whether written or not, described above are unjust or unlawful in that they are contrary to evidence and the law, violate not only the Industrial Insurance Act and the Washington State Constitution, but also RCW 2.42 and RCW 2.43; and deprive the Injured Worker of benefits under the Act which the Act was intended to provide to this Injured Worker.

Injured Worker requests that he, as a person of non-English speaking heritage be treated equally to English-speaking persons in dealings with State and the Department and be provided interpreter services for all communications with the Department; the Board; his own counsel; the Attorney General; the employer; all other representatives of the Board and the Department; all representatives of the Attorney General; all representatives of the employer [including counsel]; and of all Board proceedings including any and all conferences, motions, hearings, depositions in discovery, depositions to perpetuate testimony, and any other communications whatsoever with the Industrial Appeals Judge in which his counsel is expected to testify. These interpreter services if not paid by the Department and/or the Board, will eat up a significant if not all of the Injured Worker's benefits, further impoverishing him and his family [wife and two children dependent upon the Injured Worker], contrary to the intent of the Industrial Insurance Act and RCW 2.42 and RCW 2.43.

11. Requested Location for Conferences and Hearings: Seattle, Washington

12. SPECIAL NOTE: Interpreter Services To Be Provided at Department/Board Expense.

Because Ferid Mašić is not fluent in English, cannot effectively read English and has a non-English-speaking cultural background, he qualifies for interpreter services under RCW 2.42 and RCW 2.43 at Board/Department expense. Ferid Mašić has not and does not waive her right to interpreter services in communications with the Department or with the Board of Industrial Insurance Appeals. Therefore, he is entitled by statutes in the chapters of the RCW cited above to interpreter services for all communications necessary for him to seek relief from the Department and the Board for Industrial Insurance benefits under RCW Title 51. Ferid Mašić requests interpreter be provided to him by the Department and/or the Board for all communications necessary in order for him to receive benefits from the Department of Labor & Industries, including but not limited to the following: All communications addressed to him, his lawyer, to any of his treating physicians, to any provider for the Department, including all orders, letters, deadlines, jurisdictional histories and all contents of the Board file on this appeal and on any subsequent appeal to the Superior Court so that Ferid Mašić can

ANN PEARL OWEN, P.S.
2407 – 14TH Avenue South
Seattle, WA 98144
(206) 624-8637

participate to assist in his representation on each and every such occasion the same is needed as a function of his right to due process of law under both the United States and Washington State Constitutions. Such interpreter services should be paid for by the Department of Labor & Industries throughout, including any such expenses incurred in communications with his attorney as he would not have incurred such expenses but for his industrial injury and but for the Department's failure/refusal to ascertain his native language and communicate with him in that language.

DATED December 6, 2004,

ANN PEARL OWEN, WSBA# 9033
Attorney for Injured Worker Ferid Mašić

* Attached as Exhibit A
** Attached as Exhibit B

ANN PEARL OWEN, P.S.
2407 – 14TH Avenue South
Seattle, WA 98144
(206) 624-8637

APPENDIX H

2007 Management Update

Department of LABOR AND INDUSTRIES

Management Update

Insurance Services: Claims Administration and Self-Insurance

Effective Date
08/13/2007
REVISED 08/17/07

Topic
Interpreter and Translation Services To Workers

Issuing Authority
Sandy Dziedzic
Cheri Ward
Jean Vanek

Interpreter and Translation Services to Workers

The department or self-insured employer (SIE) (including the SIE third party administrator) will provide an interpreter to communicate with an unrepresented worker who has limited English-speaking proficiency or similarly limiting sensory impairment.

NOTE: Where a worker with limited English proficiency is represented by an attorney, the department or SIE may communicate through the attorney in English. It is the responsibility of the attorney representative to communicate with his or her client worker. If the represented worker with limited English proficiency contacts the department or SIE by phone or in person without counsel, an interpreter is authorized for the oral communications. The department or SIE is not required to provide interpreters for communications in relation to any proceedings at the BIIA or Court.

When the worker requests interpreter services, the department or SIE may verify whether the worker needs assistance in translation. Workers can report limited English proficiency status on the Report of Accident, SIF2 form, or by notifying the department or SIE by phone or letter.

Limited English proficiency is defined as limited ability or inability to speak, read, or write English well enough to understand and communicate effectively. This includes most people whose primary language is not English. Services should also be provided to workers similarly impacted by hearing, sight, or speech limitations.

Interpreters are authorized when a limited English proficiency worker needs to communicate with the department or SIE, attend medical and vocational appointments, and at independent medical examinations (IME). Authorized interpreters must be provided by the department or SIE for IMEs.

Interpreter services also include written translation of necessary correspondence to and from the unrepresented limited English proficiency worker. Copies of both the original and translated versions of the document should be maintained in the claim file.

	Resources **AT&T Language Line Instructions** http://ohr.inside.lni.wa.gov/webhome/resource_docs/InterpreterService.htm **Online Reference System (OLRS)** http://olrs.apps-inside.lni.wa.gov/ Claims Training Bulletin: Translation Process Management Memo: Spanish Translations Training Handout: Services for the Hearing & Speech Impaired WAC 296-20-2025 Contact Claims Training if you have any questions. *NOTE: This is an interim policy change. This issue has been referred to the policy committee to be included in upcoming revisions.*

NO. 60139-3-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

FERID MASIC,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that she caused a copy of the **Respondent's Brief** and attached copy of **Appendix A (Superior Court Judgment), Appendix B (Board Decision), Appendix C (9/28/04 Order), Appendix D (4/13/04 Order), Appendix E (Masic's Protest), Appendix F (Notice of Representation), Appendix G (Masic's Notice of Appeal),** and **Appendix H (2007 Management Update),** to be served and delivered by ABC Legal Services to the attorney for the Appellant, as follows:

ANN PEARL OWEN
2407 14TH AVENUE SOUTH
SEATTLE WA 98144-5014

DATED at Seattle, Washington, December 10, 2007.

PETRA I. DIAZ
Office of the Attorney General
Labor and Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188